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**ATTORNEY DIRECT-TARGET MAIL SOLICITATION:
REGULATING AFTER *SHAPERO V.*
*KENTUCKY BAR ASSOCIATION***

I. INTRODUCTION

The first amendment of the United States Constitution prohibits the abridgment of speech.¹ Different types of speech, however, warrant different levels of constitutional protection. Commercial advertising, one type of speech, has never warranted the same degree of protection as non-commercial expression.² One particular type of advertising subject to strict regulation is that of attorneys. Prior to 1977, attorney advertising was generally prohibited on a nation-wide basis.³ Recently, in *Shapero v. Kentucky Bar Association*,⁴ the Supreme Court of the United States struck down an absolute ban on direct-target mail solicitation. The Court determined that an absolute ban on this form of attorney advertising was an impermissible regulation violating the Constitution and, therefore, could not stand.⁵

Attorney advertising, generally, is a subject of concern because of the unique problems it presents. An inherent conflict exists between an attorney's ethical obligations and a desire to advance self-serving pecuniary interests. The lawyer has the right to exercise his or her first amendment rights, but the public is entitled to protection from overreaching and deceptive practices. Additionally, direct-target mail solicitation, one form of attorney advertising, is unique and different from other forms of advertising. This advertising form is unlike general public announcements, periodical advertising or radio and television commercials because the recipient has been specifically selected and the communication specially designed. Yet, the direct-target letter is not really comparable to in-person solicitation since the reader has more control over the communication.⁶ Unregulated, the advertising attorney can engage in unethical

1. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press" *Id.*

2. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760-61 (1976). An advertisement is generally a form of commercial speech, designed for the pecuniary gain of the advertiser. *Id.* at 762. Non-commercial speech, which may advance political ideals, lacks the motivation of pecuniary gain. *In Re Primus*, 436 U.S. 412, 437-38 (1978).

3. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

4. 108 S. Ct. 1916 (1988).

5. *Id.* at 1924.

6. See *infra* notes 312-73 and accompanying text.

and deceptive practices effectively abusing his or her public trust. However, even though the potential for harm may be greater than other areas of advertising, the attorney's speech is entitled to the same protection as other commercial speech.

When evaluating the constitutional protection warranted by commercial speech the Court relies on the commercial speech doctrine. As the commercial speech doctrine developed, a four-part test emerged to decide whether the speech was entitled to constitutional protection.⁷ The test, built upon modern commercial speech decisions,⁸ was first articulated in the commercial speech case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁹ The *Central Hudson* Court held that for commercial expression to fall within the protection of the first amendment:

It at least must concern lawful activity and not be misleading. Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁰

Attorney advertising is one form of commercial speech where the four-part test is particularly helpful. Guidance must be given to agencies to assist them in advancing reasonable regulations regarding attorneys' conduct. Due to heightened concerns involving the attorney's obligations to society and prospective clients, regulating direct-target mail solicitations is an important function of state bar associations.¹¹ Continued validity of the four-part test is important especially now if states choose to formulate new, permissive regulations on direct-mail solicitations.

In *Shapero*, the Court correctly concluded that an absolute ban on direct-target mail solicitation violates the first amendment.¹² In arriving at its decision, however, the *Shapero* Court ignored the four-part *Central Hudson* test, which should provide needed guidance to agencies regulating attorney advertising, and improperly relied upon previous attorney

7. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

8. *Virginia Pharmacy*, 425 U.S. 748; *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

9. 447 U.S. at 566.

10. *Id.*

11. In *Shapero*, the Kentucky Bar Association Attorney Advertising Commission was responsible for fashioning attorney advertising regulations. *Shapero*, 108 S. Ct. at 1919 n.1 (citing K.Y. SUP. CT. R. 3.135(3) (1988)).

12. *Shapero*, 108 S. Ct. at 1920.

advertising decisions.¹³ As a result, the Court undermined the efficacy of the test, thereby removing the guidance it provided to regulating agencies.

This Note analyzes ethical and other considerations evoked by attorney direct-target mail solicitations. The four-part *Central Hudson* test is then applied to the regulation struck down in *Shapero* to demonstrate that the Court could have found the rule invalid even under the *Central Hudson* test, thus showing that the Court could have preserved the test and its potential benefits to regulating agencies. Finally, this Note suggests regulations to control direct-target mail solicitation consistent with *Shapero*.

II. HISTORICAL BACKGROUND

A. Development of Constitutional Protection Accorded Commercial Speech

1. Early case law

Prior to the 1940's, the level of first amendment protection accorded commercial speech was unsettled.¹⁴ No Supreme Court case ever directly addressed commercial speech until *Valentine v. Chrestensen*.¹⁵ In *Chrestensen*, Chrestensen was prevented by the municipal police from distributing handbills in New York City.¹⁶ One side of the handbill advertised and offered tours of Chrestensen's submarine.¹⁷ The reverse side of the handbill protested the City's action in refusing docking facilities for his exhibit.¹⁸ The Court rejected Chrestensen's contention that his conduct was protected by the first amendment in spite of its commercial undertone.¹⁹ In a brief opinion, the Court defined what came to be known as the "commercial speech doctrine":

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its

13. *Id.* at 1921-24. See *infra* notes 374-461 and accompanying text.

14. See generally 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.27-31 (1986) [hereinafter R. ROTUNDA].

15. 316 U.S. 52 (1942), *overruled on other grounds*, Schamburg v. Citizens for Better Environment, 444 U.S. 620 (1980).

16. *Id.* at 53.

17. *Id.*

18. *Id.*

19. *Id.* at 54-55.

employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*²⁰

This pronouncement was read to permit a commercial speech regulation in *Breard v. Alexandria*,²¹ the next decade's important commercial speech decision. Breard was convicted of violating a local ordinance prohibiting door-to-door solicitation by selling subscriptions to nationally recognized magazines.²² Raising the first amendment as a defense, Breard argued that because the magazines sold were constitutionally protected, the solicitation itself was shielded from regulation.²³ Breard argued that the special constitutional protection granted to newspapers and periodicals bootstrapped his activity of selling those materials into protected first amendment territory.²⁴ The Court rejected his argument, observing that the underlying profit motive deprived the parties of absolute first amendment protection.²⁵

From *Chrestensen* and *Breard*, emerged a balancing approach used by the Court to distinguish unprotected commercial speech from the right to disseminate information and publish.²⁶ In operation, the individual's right to privacy is weighed against the commercial enterprises' "right to distribute" and solicit business.²⁷ For example, in *Breard*, the homeowner's privacy interest in avoiding door-to-door salesmen prevailed over the right to sell the magazines.²⁸ The Court noted a high degree of community concern for protecting "the serenity of

20. *Id.* at 54 (emphasis added). By printing a public protest message on the reverse of the handbill, the Court reasoned that Chrestensen's sole purpose was to invoke constitutional protection for the entire handbill, nonetheless, the Court concluded that the communication was primarily commercial in nature.

21. 341 U.S. 622 (1951), *overruled on other grounds*, *Schamburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

22. *Id.* at 624-25.

23. *Id.* at 641.

24. *Id.* at 641-42.

25. *Id.* at 642. *But see* *Martin v. Struthers*, 319 U.S. 141 (1943). In this post-*Chrestensen* case, the Court acknowledged first amendment constitutional protection for conduct similar to that in *Breard*. This case is distinguishable because the ordinance prohibited a religious organization (Jehovah's Witnesses) from canvassing door-to-door. *Id.* at 142. The *Breard* Court indicated that the ordinance in *Martin* "was not aimed 'solely at commercial advertising.'" *Breard*, 341 U.S. at 642 (quoting *Martin v. Struthers*, 319 U.S. 141, 142 n.1 (1943)). *See also* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (mere fact that religious literature is sold does not automatically transfer religious conduct into commercial activity, thus denying first amendment protection).

26. *Breard*, 341 U.S. at 644.

27. *Id.*

28. *Id.* at 644-45.

housewives.”²⁹

In the years following *Chrestensen* and *Breard*, the Court began to recognize that the first amendment protected speech that had some profit motive but was also political.³⁰ In fact, in *New York Times v. Sullivan*,³¹ the Court was easily able to distinguish protected political speech from commercial speech. In *New York Times*, a political advertisement was placed in the newspaper and the publication profited from the sale of advertising space.³² The Court did not automatically classify the speech as “purely commercial” simply because there was a profit motive; therefore the speech was entitled to some first amendment protection.³³

Instead, the Court in *New York Times* established the “primary purpose test,” where the underlying function of an advertisement, and not merely its form, is analyzed to determine if it is commercial in nature and, therefore, not entitled to constitutional protection.³⁴ During the first twenty years after the Court articulated a position on commercial speech in *Chrestensen*, the “primary purpose test” was fine tuned, but its development did not change the Court’s position on commercial speech:³⁵ Commercial speech as commercial speech did not warrant any specific or special protection.

2. Modern case law development

During the 1970s, the Court began to make inroads into the com-

29. *Id.*

30. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (film maker entitled to first amendment protection because “books, newspapers, and magazines . . . published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in . . . motion pictures.”); *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (mere profit motive in raising money for local initiative made no difference although petitioner would benefit economically if initiative passed).

31. 376 U.S. 254 (1964).

32. *Id.* at 266.

33. *Id.*

34. R. ROTUNDA, *supra* note 14, §§ 20.27-31. If the primary purpose of the speech is commercial, then including political information in the advertisement will not bring it within constitutional protection. *See, e.g., Chrestensen*, 316 U.S. 52 (1942), *overruled on other grounds*, *Schamburg v. Citizens for Better Environment*, 444 U.S. 620 (1980) (handbill held commercial and not subject to first amendment protection even though political message was included as primary purpose was commercial). However, if the primary purpose of the speech is political, then it is entitled to protection. *New York Times*, 376 U.S. at 265-66.

35. *Compare Chrestensen*, 316 U.S. at 53 (pure commercial speech not protected even though political speech extraneously involved) with *New York Times*, 376 U.S. at 265-66 (political speech protected even though some profit motive involved). *But cf. Cammarano*, 358 U.S. at 513-14 (Douglas, J., concurring) “[the] ruling [in *Chrestensen*] was casual, almost off-hand. And it has not survived reflection.”)

mercial speech doctrine and its primary purpose test. In a series of three cases, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,³⁶ *Bigelow v. Virginia*,³⁷ and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁸ decided within a four-year span, a new approach to commercial speech was established.

In *Pittsburgh Press*, a local newspaper accepted gender designation of employment offerings in its classified advertising section.³⁹ A Pittsburgh city ordinance prohibited gender discrimination, and accordingly, the newspaper was ordered to bring its advertising under the gender-neutral policy.⁴⁰ The newspaper argued that the city could not regulate them because even if advertisements were commercial in nature, they were still entitled to a higher degree of protection than *Chrestensen* and its progeny would suggest.⁴¹ In upholding the ordinance, the Court did not reject nor expressly accept the newspaper's suggestion that the prior decisions were wrong in not affording some constitutional protection to commercial speech, but noted that:

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.⁴²

If the *Pittsburgh Press* Court had relied on the primary purpose test, it could have upheld the regulation as controlling speech that was primarily commercial, because the primary purpose of the communication was commercial.⁴³ Instead, the Court chose to focus on the underlying illegal conduct. The Court did not reject *Chrestensen* but articulated a newer test: If "the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation," the state may regulate.⁴⁴ Thus, the Court shifted its primary focus away from the pure commercial/profit nature of this transaction and centered on the illegal-

36. 413 U.S. 376 (1973).

37. 421 U.S. 809 (1975).

38. 425 U.S. 748 (1976).

39. *Pittsburgh Press*, 413 U.S. at 379.

40. *Id.* at 380-81.

41. *Id.* at 388.

42. *Id.* (emphasis in original) (footnote omitted).

43. *New York Times*, 376 U.S. at 265-66 (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)); see also R. ROTUNDA, *supra* note 14, §§ 20.27-31.

44. *Pittsburgh Press*, 413 U.S. at 389.

ity of the underlying act.⁴⁵

Two years later, in *Bigelow*, the Court found broad constitutional protection available for commercial speech involving legally protected activities.⁴⁶ After a New York family planning clinic advertised abortion services in a University of Virginia student newspaper, the editor was convicted under a state statute forbidding such advertisement.⁴⁷ While on appeal, the Supreme Court decided the landmark case of *Roe v. Wade*,⁴⁸ which limited the states' ability to regulate abortions.⁴⁹ Thus the underlying conduct in *Bigelow*—legal abortions—was determined by the Court to be a specially protected activity. In overturning *Bigelow*'s conviction and invalidating the statute, the Court virtually overruled *Chrestensen* by stating that:

[T]he holding [in *Chrestensen*] is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.⁵⁰

While *Pittsburgh Press* expressly permitted government regulation of commercial advertising of illegal activity,⁵¹ the *Bigelow* Court found the questioned speech to be constitutionally protected if the conduct that the speech encouraged was legal.⁵² In the final portion of the *Bigelow* opinion, the Court acknowledged for the first time that "[t]he policy of the First Amendment favors dissemination of information and opinion" even in purely commercial advertisements.⁵³

In the final case, *Virginia Pharmacy*, the Court was presented with a

45. *Id.*

46. *Bigelow*, 421 U.S. at 828.

47. *Id.* at 812-15.

48. 410 U.S. 113 (1973).

49. *Id.* at 153.

50. *Bigelow*, 421 U.S. at 819-20.

51. *Pittsburgh Press*, 413 U.S. at 388-89 (concluding that regulation of illegal advertisement a constitutional practice). See *supra* notes 39-45 and accompanying text.

52. *Bigelow*, 421 U.S. at 828-29.

53. *Id.* at 829. Dissemination of information has become an important underlying theme in attorney advertising cases. For example, in *Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1918 (1988), the Court stated that "'the free flow of commercial information is valuable enough to justify imposing' " the cost of regulation on the state bar associations. *Id.* at 1924 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)).

commercial advertising case involving neither an illegal nor a specially protected activity.⁵⁴ In Virginia, a pharmacist was subject to discipline for advertising the price of prescription drugs.⁵⁵ The regulation was challenged by a group of consumers who required prescription drugs and wanted the benefit of price comparison.⁵⁶ The advertisement of prescription drugs did not involve either underlying illegal conduct or a specifically protected activity.⁵⁷ Rather, the advertisement was pure commercial speech: "I will sell you the X prescription drug at the Y price."⁵⁸ In holding the Virginia regulation invalid the Court noted that the "notion of unprotected 'commercial speech' all but passed from the scene" in *Bigelow*.⁵⁹

In effect, the Court's holding in *Virginia Pharmacy* finally overruled *Chrestensen* and its progeny, while reserving three important areas of regulation in the area of commercial speech for the states.⁶⁰ First, standard time, place and manner restrictions, if content neutral, are generally valid in all types of speech cases as long as significant government interests are served.⁶¹ Second, if the speech is false, misleading or untruthful,

54. *Virginia Pharmacy*, 425 U.S. at 760-61. This was the first case to reach the Court where commercial speech was analyzed as a distinct form of speech. See *Breard*, 341 U.S. at 641-42 (rejecting argument that underlying activity bootstrapped petitioner's commercial activity into constitutional protection); *Pittsburgh Press*, 413 U.S. at 389 (upholding regulation because advertisement involved illegal act—discrimination); *Bigelow*, 421 U.S. at 826-27 (invalidating regulation as underlying activity worthy of special constitutional protection).

55. *Virginia Pharmacy*, 425 U.S. at 752.

56. *Id.* at 753-54.

57. *Id.* at 760-61. This is unlike *Pittsburgh Press*, where the underlying gender-based discrimination was illegal. *Pittsburgh Press*, 413 U.S. at 389. The facts are not like *Bigelow*, where the procurement of abortions under certain circumstances was expressly protected and legal. *Bigelow*, 421 U.S. at 826-27. The conduct in *Virginia Pharmacy* was purely commercial. *Id.* at 759-60.

58. *Id.* at 761.

59. *Id.* at 759.

60. *Id.* at 771.

61. *Id.*; see also *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (anti-noise ordinance prohibiting loud disturbances near school not violative of first amendment as regulation content neutral and designed to further significant governmental interest—preventing disruption of class work); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card not protected speech under first amendment). Time, place and manner regulations are designed to control the circumstances surrounding the speech, but not the content of the speech. *Linmark Assocs. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (local ordinance prohibiting the posting of "for sale" and "sold" signs violates first amendment and not content neutral). When the content is regulated because of overly extensive time, place and manners restrictions, the regulation will generally not withstand constitutional scrutiny. *Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board may not exclude and discriminate between speakers at meetings); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (ordinance prohibiting picketing near school, but exempting labor pickets made impermissible distinction and thus violated the Constitution).

then under all circumstances it is unprotected and subject to regulation.⁶² Finally, if the underlying product or service is illegal, the advertisement may be banned.⁶³

Thus, from the Court's decision in *Virginia Pharmacy*, a very different commercial speech doctrine emerged: No longer were the profit motives of the advertiser conclusive. Instead the Court examined the nature of the advertisement and the government interests served by the regulations to determine the regulation's validity. Speech, however, that is primarily commercial would still trigger a different set of regulations than, for example, political speech.⁶⁴

Although *Virginia Pharmacy* elevated the protection afforded commercial speech, it remains less protected than political speech.⁶⁵ The state may continue to regulate, but not prohibit outright, the dissemination of truthful information about lawful commercial activities.⁶⁶ The *Virginia Pharmacy* Court reserved decision on questions involving the problems inherent in attorney advertising.⁶⁷

3. Development of case law involving attorney advertising

The year following *Virginia Pharmacy*, 1977, brought the first Supreme Court decision involving lawyer's advertising directed to the general public, *Bates v. State Bar of Arizona*.⁶⁸ Bates, an attorney, and his law partner opened a low cost legal clinic in Phoenix serving middle to lower middle class residents.⁶⁹ In an effort to attract business, they ran a single-column newspaper advertisement offering their legal serv-

62. *Virginia Pharmacy*, 425 U.S. at 771-72; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

63. *Virginia Pharmacy*, 425 U.S. at 772-73; see also *Pittsburgh Press*, 413 U.S. at 388; *supra* notes 39-45 and accompanying text.

64. *Virginia Pharmacy*, 425 U.S. at 771 n.24; see also R. ROTUNDA, *supra* note 14, § 20.31 at 143-44. Courts have traditionally strictly scrutinized regulations of political speech. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964).

65. *Virginia Pharmacy*, 425 U.S. at 758-61.

66. *Id.* at 771 n.24; see also R. ROTUNDA, *supra* note 14, § 20.31.

67. *Virginia Pharmacy*, 425 U.S. at 773 n.25. The Court noted the particular issues involved in professional advertising, including situations involving attorneys. However, the Court reserved the resolution of these issues for another day. *Id.*

68. 433 U.S. 350 (1977). In other cases, the Supreme Court has dealt with issues peripheral to attorney advertising. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (bar associations listing suggested minimum fees for standard legal tasks violated Sherman anti-trust Act); *United Transp. Union v. Michigan Bar*, 401 U.S. 576 (1971) (union referral of members to lawyers did not violate lawyer's ethical standards); *NAACP v. Button*, 371 U.S. 415 (1963) (attorney's action of soliciting clients for civil rights lawsuits entitled to constitutional protection).

69. *Bates*, 433 U.S. at 354.

ices.⁷⁰ The State Bar of Arizona disciplined the two attorneys for specifically violating a state supreme court rule prohibiting attorney newspaper advertisements.⁷¹ In *Bates*, the Court held that the Arizona "disciplinary rule [was] violative of the First Amendment [and] might be said to flow *a fortiori* from [*Virginia Pharmacy*]." ⁷² In the Court's view, advertising for certain standardized legal services was allowed. However, the Court reaffirmed clearly permissible advertising limitations set out in *Virginia Pharmacy*.⁷³ Regulations could address time, place or manner, and restrain false, deceptive or misleading advertising.⁷⁴

It is clear from the *Bates* opinion that the Court did not view a newspaper advertisement that merely stated costs of specific standardized services as a threat to the ethical constraints in the legal system. In fact, the Court dismissed the practicing bar's six specific concerns that advertising would erode the legal profession⁷⁵ by stating:

with advertising, most lawyers will behave as they always have:

70. *Id.* The advertisement read, in part: "DO YOU NEED A LAWYER . . . Legal Services At Very Reasonable Fees . . ." *Id.* at 385 (emphasis in original).

71. *Id.* at 355-60. The Arizona Disciplinary Rule 2-101(B) (incorporated in Rule 29(a) of the Arizona Supreme Court 17A, ARIZ. REV. STAT. ANN. p. 26 (Supp. 1976)), provided in part:

A lawyer shall not publicize himself, or his partner, or his associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. (cited in *Bates v. State Bar of Ariz.*, 433 U.S. 350, 355 (1977)).

72. *Bates*, 433 U.S. at 365.

73. *Id.* at 383 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 & n.24 (1976)).

74. *Id.* at 383-84.

75. In *Bates*, the ABA, as amicus curiae, advanced their concerns of the effects advertising might have on the bar of the United States. *Id.* at 368-79. The six areas of concern were:

(1) The adverse effect on professionalism (Court found no connection between advertising and professionalism—in fact, it believed advertising would advance the profession and its image in public eye.);

(2) the inherently misleading nature of attorney advertising (the *Bates* opinion focused on "routine services" such as adoption, uncontested divorce and uncontested bankruptcy as type of matters attorneys likely to advertise. In such advertisements, Court believed attorneys' advertisement would accurately quote fees, but the *Bates* Court did acknowledge that advertising would not provide a "complete foundation on which to select an attorney." However, Court reasoned that some information was better than keeping the public in ignorance, and organized bar could discipline attorneys who misled.);

(3) the adverse effect on the administration of justice (Court disagreed with argument that advertising would encourage litigation, because burden of any judicial increase would be outweighed by benefit of newly available standardized legal services to vast majority of population who "underutilize" legal services.);

(4) the undesirable economic effects of advertising (Court rejected arguments that overhead costs would increase and young lawyers would be prevented from establishing practices.

They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.⁷⁶

Simply stated, the *Bates* Court overruled an absolute ban on attorney advertising, yet termed its own holding narrow.⁷⁷ The Court reserved the issues presented by the "peculiar problems associated with advertising claims relating to the *quality* of legal services" and issues involved with "in-person solicitation of clients . . . or in any other situation that breeds undue influence—by attorneys."⁷⁸

The *Bates* decision brought significant changes to the practice of law and was met with mixed reaction in the national legal community.⁷⁹ *Bates*, however, only scratched the surface of the subject and left many issues unresolved.⁸⁰ The following year, the Court defined the outer limits of permissible attorney advertising in two separate decisions: *In Re Primus*⁸¹ and *Ohralik v. Ohio State Bar Association*.⁸² At one end of the spectrum, *Primus* defined what type of attorney advertising the state

New legal market tapped by advertising would offset additional overhead cost of advertising and give young lawyer an opportunity to attract his or her own client base.);

(5) the adverse effect of advertising on the quality of service (Court simply stated that, "[r]estraints on advertising, however, are an ineffective way of deterring shoddy work.");

(6) the difficulties of enforcement (since lawyers are obliged to conform to established ethical standards and are self policing, they will conform and report their colleagues.). *Id.* at 368-79.

76. *Id.* at 379.

77. *Id.* The Court stated that "[t]he constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertising concerning the availability and terms of routine legal services." *Id.*

78. *Id.* at 366 (emphasis in original).

79. See Bach, *The Bach's Score*, L.A. Daily J., Nov. 21, 1977, at 12, col. 1.

80. *Bates*, 433 U.S. at 384. The *Bates* Court determined that an absolute ban on attorney advertising was impermissible, but left the door open for regulation and possible restraint of false, deceptive or misleading advertising. *Id.* After *Bates* it was clear an absolute ban would not be allowed, the states would be permitted to regulate, and in some circumstances, even ban forms of advertising. Similarly, advertising in the "electronic broadcast media" was deemed to "warrant special consideration." *Id.*

81. 436 U.S. 412 (1978).

82. 436 U.S. 447 (1978).

could *not* regulate.⁸³ At the other extreme, *Ohralik* indicated that the state could regulate certain attorney advertising and could even ban in-person solicitation.⁸⁴

Primus involved an attorney in private practice who dedicated a portion of her time to working for the American Civil Liberties Union (ACLU).⁸⁵ Attorney Primus, while representing the ACLU, attended a meeting with a welfare mother who had been sterilized as a condition of continued medical assistance under a federal program.⁸⁶ Following the meeting, Primus wrote to the woman on behalf of the ACLU and offered to represent her without cost in a lawsuit against the doctor.⁸⁷ Primus was charged with unethical solicitation and violations of the state's canons of legal ethics.⁸⁸

On appeal to the Supreme Court of the United States, Justice Powell, writing for the majority, separated this case from traditional commercial speech because it involved special circumstances—Primus lacked any motive for pecuniary gain.⁸⁹ The Court stated that Primus' letter fell within the "generous zone of First Amendment protection reserved for associational freedoms."⁹⁰ The Court concluded that a state could not punish a lawyer, who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a non-profit organization.⁹¹ The Court reasoned that in this context, the lawyer is entitled to the protection reserved for political expression, demanding a more exacting scrutiny.⁹² If the subject communication "simply 'propose[d] a commercial transaction' " and not political expression, the state could regulate it.⁹³ The letter was analyzed only for its associational freedom values, and not as a direct-mail solicitation.⁹⁴ The Court intimated that a direct-target mail solicitation

83. *Primus*, 436 U.S. at 431.

84. *Ohralik*, 436 U.S. at 468.

85. *Primus*, 436 U.S. at 414-15.

86. *Id.* at 415.

87. *Id.* at 416-17.

88. *Id.* at 417.

89. *Id.* at 422.

90. *Id.* at 431.

91. *Id.*

92. *Id.* at 432. *Primus* is similar to *NAACP v. Button*, 371 U.S. 415 (1963), where the Court permitted NAACP attorneys and staff members to solicit prospective litigants to advance important constitutional causes, including desegregation. *Id.* at 443-44.

93. *Primus*, 436 U.S. at 437-38 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

94. *Id.*

letter would present a problem not addressed by the Court.⁹⁵ However, in this case the conduct involved no pecuniary gain, was political in its roots, and accordingly, was not subject to the same treatment as commercial speech.⁹⁶

The *Primus* decision did not merely distinguish between commercial speech, political speech and the constitutionality of regulating; it also acknowledged that a state has a special interest in regulating its attorneys.⁹⁷ When the attorney is acting for a pecuniary gain, the regulators may "fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar."⁹⁸ However, when the attorney exercises associational, non-pecuniary based freedoms, the commercial speech rule does not apply.⁹⁹

Ohralik v. Ohio State Bar Association,¹⁰⁰ decided on the same day as *Primus*, illustrates how far the state can permissibly regulate. *Ohralik* involved an Ohio lawyer who, uninvited, visited a young accident victim in the hospital.¹⁰¹ The attorney then visited a second victim at her home and concealed a small tape recorder under his jacket to insure evidence of the client's consent to representation.¹⁰² Shortly after coercing both persons to agree to representation, the attorney was discharged by his "clients" and their parents.¹⁰³ Disciplinary charges were filed against the petitioner for violating a rule of professional responsibility that prohibited direct in-person solicitation of clients.¹⁰⁴ The Ohio Supreme Court reviewed the case and ordered the attorney indefinitely suspended from practicing law.¹⁰⁵ This sanction was upheld by the Supreme Court of the

95. *Id.* at 435-36.

96. *Id.* at 439.

97. *Id.* at 438.

98. *Id.* (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977)).

99. *Id.* at 439.

100. 436 U.S. 447 (1978).

101. *Id.* at 450.

102. *Id.* at 450-51.

103. *Id.* at 451-52. Attorney Ohralik did not willingly agree to discontinue representing the accident victims, even after his discharge. *Id.* at 452. Ohralik subsequently made it difficult for the two victims to recover by refusing to endorse the settlement drafts issued by the insurer until his fee was paid. *Id.* at 452 n.5. He also insisted on payment under the one-third contingency fee agreement, and even filed suit against one of his former "clients" for non-payment. *Id.* at 452.

104. *Id.* at 453. The Ohio disciplinary rules are fashioned after the Model Code of Professional Responsibility promulgated by the American Bar Association. DR 2-104(A) provides, in pertinent part, that "a lawyer who has given in-person *unsolicited* advice to a lay-person . . . shall not accept employment resulting from that advice." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1981)(emphasis added).

105. *Ohralik*, 436 U.S. at 453-54.

United States.¹⁰⁶

The *Ohralik* Court recognized that under certain circumstances, regulations that ban attorney advertising or solicitation may not violate the first amendment.¹⁰⁷ In-person solicitation of clients for pecuniary gain is a classic example of the type of conduct warranting a so-called "prophylactic" ban.¹⁰⁸ The rationale of the Court indicated how the conduct of the attorney in *Ohralik* made the regulation acceptable and even necessary:

Unlike the advertising in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date.¹⁰⁹

In the final portion of its opinion, the Court indicated that because the likelihood of harm is particularly high with in-person solicitation, proof of actual injury from the action is not necessary.¹¹⁰

Read independently, the decision in *Ohralik* could be limited to its narrow holding permitting the state to regulate in-person solicitations of clients.¹¹¹ Read broadly, however, and in conjunction with *Primus*, certain principles in attorney advertising regulation emerge. An attorney may engage in political speech in his or her professional role, and the speech will be protected.¹¹² Yet, states may constitutionally regulate the attorney's solicitation when it is for pecuniary gain.¹¹³ The *Ohralik* Court concluded that reasonable regulations of in-person solicitation, short of an absolute ban, could be enforced in specific circumstances to further the "high standards among licensed professionals."¹¹⁴ Moreover, the Court asserted that the "interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of

106. *Id.*

107. *Id.* at 466-67.

108. *Id.* It is known as a prophylactic ban because no showing of actual injury or damage is required in order for it to be enforced. *Id.*

109. *Id.* at 466.

110. *Id.* at 468.

111. *Id.*

112. *Primus*, 436 U.S. at 432-33; see also *Ohralik*, 436 U.S. at 463 n.20, which restates the rule as, "a lawyer who engages in solicitation as a form of protected political association, generally may not be disciplined without proof of actual wrongdoing"

113. *Ohralik*, 435 U.S. at 464.

114. *Id.* at 460-62.

the courts.’ ”¹¹⁵ Thus, the Court indicated that under narrow circumstances, the state may absolutely ban a form of commercial advertising if the regulation is absolutely necessary to protect the public.¹¹⁶ For example, the Court suggested that solicitations involving “fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct’ ” could constitute a compelling state interest worthy of regulation.¹¹⁷

After *Primus* and *Ohralik*, it remained uncertain exactly what other types of conduct a state could regulate by implementing an absolute ban on the speech.¹¹⁸ In-person solicitation could be prohibited, but *Ohralik* left unstated what other types of conduct could be regulated. No guidance was given in the first three attorney advertising cases for defining circumstances which would permit a state to regulate attorney advertising short of situations involving in-person solicitation.¹¹⁹

B. The Modern Test for Commercial Speech

As commercial speech law evolved, no definitive signal was sent to regulators precisely outlining where restrictions and prohibitions were permissive. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹²⁰ the Supreme Court established a clear four-part test to distinguish which governmental regulations of commercial speech were constitutional. In *Central Hudson*, the Court invalidated a regulation enacted during the energy/oil shortage of the early 1970s which prohibited electric utilities from promoting the use of electricity.¹²¹ Although the regulation arguably advanced important public interests, the Court found the ban on the speech to be overreaching.¹²²

Justice Powell, writing for the majority, established a four-part analysis for courts to use to determine whether the first amendment protects

115. *Id.* at 460 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

116. *Id.* at 467 n.29.

117. *Id.* at 462.

118. In the three attorney advertising cases to reach the Supreme Court following *Ohralik*, no complete ban on advertising has been upheld. See *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), *infra* notes 212-309 and accompanying text; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), *infra* notes 177-209 and accompanying text; *In Re R. M. J.*, 455 U.S. 191 (1981), *infra* notes 160-76 and accompanying text.

119. See *Bates*, 433 U.S. at 383-84 (“many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved”); *Primus*, 436 U.S. at 438 n.33 (“[w]e have no occasion here to delineate the precise contours of permissible state regulation”); *Ohralik*, 436 U.S. at 462 (“we need not discuss or evaluate each of these [state] interests in detail as appellant has conceded that the State has a legitimate . . . interest”).

120. 447 U.S. 557 (1980).

121. *Id.* at 558-59.

122. *Id.* at 571-72.

a particular commercial expression.¹²³ Justice Powell indicated that, preliminarily, the court should determine whether the speech is commercial.¹²⁴ If so, then the court analyzes the speech under the following four factors: (1) the speech must concern lawful activity and not be misleading—if the speech concerns unlawful activity or is misleading, then the speech is unprotected;¹²⁵ (2) whether the asserted governmental interest is substantial—if it is not substantial then the speech is protected; if the speech concerns lawful activity, and is not misleading, *and*, then the governmental interest must be substantial;¹²⁶ (3) whether the regulation directly advances the asserted governmental interest—if not, the regulation fails;¹²⁷ and finally (4) whether the regulation extends further than necessary to advance the asserted governmental interest—if so, then the regulation fails.¹²⁸

The Court's application of the test to the facts of *Central Hudson* illustrates the effectiveness of the test. The New York Public Service Commission (Commission) banned electric utilities from promotional advertising that stimulated the purchase of energy. The regulation did, however, allow "informational" advertising, that which was not clearly intended to promote sales. At the outset, the Court determined that the

123. *Id.* at 566.

124. *Id.* The Court carefully noted that the test is reserved for those cases where the speech involved is "commercial." *Id.* Other criteria and tests are utilized when the speech is, for example, political. Generally, higher scrutiny is warranted if the speech is political in nature, see *In Re Primus*, 436 U.S. 412 (1978). If, however, the speech is not protected, such as when the speech is obscene, then little or no exacting scrutiny is necessary to determine whether a regulation prohibiting the speech is valid. *Miller v. California*, 413 U.S. 13, 24-25 (1973). The *Central Hudson* test is intended to be applied to commercial speech regulation. *Central Hudson*, 446 U.S. at 566. A discussion of these different tests is beyond the scope of this Note.

125. If a state or local government is preventing the promotion of illegal conduct, the regulation will be upheld without further analysis. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *supra* notes 39-45 and accompanying text. If a government is attempting to regulate false or misleading advertising, it may do so without establishing a "substantial interest." *Central Hudson*, 447 U.S. at 566.

126. However, once the advertisement involves conduct that is either expressly protected, that is "not . . . misleading" or concerns "lawful activity," the balance of the *Central Hudson* test must be applied. See *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). For a discussion of *Bigelow* see *supra* notes 46-53 and accompanying text.

127. In this second stage of the analysis, a court must invalidate regulations that "only indirectly advance the state interest involved." *Central Hudson*, 447 U.S. at 564. For example, in *Bates*, the regulation did not advance a substantial state interest by employing an absolute attorney advertising ban to deter "shoddy work" by an attorney. *Id.* at 564-65 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378 (1977)).

128. In this "ends-means" analysis, the reviewing court determines if the regulation is "narrowly drawn" to "advance the governmental interest." *Id.* at 566-71. The *Central Hudson* decision itself is an example of a valid goal (regulating energy use) sought to be attained by a means (the specific regulation at issue) more extensive than necessary to achieve that goal. *Id.* at 569-70.

speech banned was commercial.¹²⁹ The Court noted that there was no rational reason to suggest that a private, state-authorized monopoly was not entitled to engage in commercial activity furthered by its advertising.¹³⁰ Regulated industries and professions have been capable of producing speech that is promotional, and subject to treatment as commercial speech.¹³¹ Moving to the test itself, the Court noted that, under the first factor, the Commission did not advance arguments that the "expression" in the advertising was misleading or involved unlawful activity.¹³² Second, the Court concluded that the state's interest was indeed substantial.¹³³ Two separate reasons were advanced and accepted by the Court; one involved the need to reduce energy demands brought about by the "energy crisis," and the other centered on a concern that the shifting of power usage to "off peak" hours would cause disproportional rate increases.¹³⁴ Addressing the third factor of the four-part test, the Court scrutinized the ban's actual relationship with the two interests analyzed in the preceding step.¹³⁵ The absolute ban, the Court concluded, did not effectively advance the state's interest in regulating and controlling the proportionality of rates.¹³⁶ Thus, this argument of the Commission could not be used to uphold the regulation because the state's interest was not directly advanced.¹³⁷ The Court determined, however, that there was a direct "link" between the advertising ban and the state's interest in conserving energy.¹³⁸ Finally, the fourth criteria—requiring that the regulation be "no more extensive than necessary to further the State's interest in energy conservation"—was not met by this absolute ban.¹³⁹ The Court cited numerous examples of alternative, less restrictive methods available to the Commission for promoting energy conservation.¹⁴⁰ The Court also stated that "[t]he Commission's order prevents appellant from promoting electrical services that would reduce

129. *Id.* at 561.

130. *Id.* at 567.

131. *Id.*; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (lawyers); *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (pharmacists); and *Friedman v. Rogers*, 440 U.S. 1 (1975) (optometrists).

132. *Central Hudson*, 447 U.S. at 566.

133. *Id.* at 568.

134. *Id.* at 568-69.

135. *Id.* at 569.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 569-70.

140. *Id.* at 570-71. "It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future." *Id.* at 571.

energy use by diverting demand from less efficient sources."¹⁴¹

The *Central Hudson* Court intimated that under some circumstances, where a "showing that a more limited speech regulation would be ineffective," a total ban could be upheld.¹⁴² In 1986, the Court upheld such a ban in *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*.¹⁴³ In *Posadas*, the Commonwealth of Puerto Rico banned Puerto Rican Casinos from advertising within the territory.¹⁴⁴ After applying the *Central Hudson* four-part test, the Court upheld Puerto Rico's ban.¹⁴⁵

The *Posadas* Court methodically proceeded through the four-part test, first determining that the advertisement did not involve illegal conduct and was not false or misleading.¹⁴⁶ Citing the prevention of "disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime," the Court easily found a substantial governmental interest in regulating the advertising.¹⁴⁷ The Court then determined that the restriction directly advanced the government's interest.¹⁴⁸ Finally, the Court found that the ends sought to be achieved through the regulation were advanced by means carefully chosen to be no more extensive than necessary to discourage local casino gambling.¹⁴⁹ In reaching its conclusion, the Court analyzed outside factors such as the social history of local gambling to determine the narrowness of the regulation.¹⁵⁰ *Posadas* stands as an example of how the *Central Hudson* test is an effective and comprehensive tool for determining whether the first amendment protects a given commercial expression.¹⁵¹

141. *Id.* at 570.

142. *Id.* at 571.

143. 478 U.S. 328 (1986).

144. *Id.* at 332-33 (citing P. R. R. & REGS. tit. 15 § 76a-1(7) (1972)).

145. *Id.* at 344. The case involved a local casino which brought the lawsuit after twice being fined for violating the regulation. *Id.* The Court stated that once the advertisement was determined to involve pure commercial speech, the "first amendment analysis is guided by the general principles identified in *Central Hudson*." *Id.* at 340.

146. *Id.* at 341-42.

147. *Id.* at 341.

148. *Id.*

149. *Id.* at 343-44.

150. *Id.* at 343 n.8.

151. For other cases applying the four-part *Central Hudson* test see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Heffron v. International Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

C. Modern Attorney Advertising Case Law

Following the *Bates v. State Bar of Arizona*¹⁵² decision, the organized bar, during the first half of the 1980s began to respond to the significant changes in attorney advertising.¹⁵³ The original Model Code of Professional Responsibility, originally promulgated by the American Bar Association (ABA) at the turn of the century, became outdated in the area of attorney advertising.¹⁵⁴ The new Model Rules of Professional Conduct, adopted by the ABA in 1983, attempted to conform with attorney advertising guidelines set out by the decisions of the Supreme Court of the United States.¹⁵⁵ For example, attorneys were no longer prohibited from advertising in the media, phone books, or legal directories available to the public.¹⁵⁶ However, traditional prohibitions against solicitation were retained.¹⁵⁷ The Model Rules state:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular manner, but who are so situated that they might in general find such services useful.¹⁵⁸

Two cases decided during the first half of the 1980s further defined the permissible limits of regulating lawyers' commercial speech.¹⁵⁹ In 1982, the Court decided *In Re R. M. J.*¹⁶⁰ In *R. M. J.* an attorney placed advertisements in newspapers and the yellow pages, and sent professional announcement cards to the general public.¹⁶¹ The advertisements stated

152. 433 U.S. 350 (1977).

153. See MODEL RULES OF PROFESSIONAL CONDUCT (1983).

154. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

155. MODEL RULES, *supra* note 153, Rules 7.1-7.5.

156. *Id.* at Rule 7.2.

157. The Model Rules retained the prohibition against direct contact with prospective clients, which includes in-person, telephonic and direct-mail solicitations. MODEL RULES, *supra* note 153, Rule 7.3.

158. *Id.* at Rule 7.3.

159. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In Re R. M. J.*, 455 U.S. 191 (1982); see also R. ROTUNDA, *supra* note 14, § 20.31 at 148.

160. 455 U.S. 191 (1982).

161. *Id.* at 196.

in prohibited bold capital letters that the attorney was "Admitted to Practice Before the UNITED STATES SUPREME COURT."¹⁶² In addition, Missouri's Rules of Professional Conduct prescribed the precise language available for advertisements; however, the attorney diverged slightly from the prescribed language in several practice-area descriptions.¹⁶³ The state rules also prohibited general mailings and limited mailing advertisements to lawyers, clients, former clients, personal friends and relatives.¹⁶⁴

The Missouri Supreme Court found that the attorney had violated the Missouri rules and, accordingly, privately reprimanded the attorney.¹⁶⁵ The Supreme Court of the United States reversed, finding that the state regulations violated the first amendment as it applies to commercial speech.¹⁶⁶ The Court applied the four-part test of *Central Hudson Gas & Electric Corp. v. Public Utilities Commission of New York*,¹⁶⁷ for the first time to a regulation affecting attorney advertising. The Court stated that "the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public."¹⁶⁸

Under the first factor of the test, the Court found that there was nothing to indicate the advertisements were misleading or involved illegal conduct.¹⁶⁹ Although the Court did not specifically identify any substantial state interest sought to be advanced by the regulation—the second factor, it did comment generally on the state's authority to regulate its attorneys and protect the public.¹⁷⁰ Instead, the Court focused on

162. *Id.* (emphasis in original).

163. *Id.* at 196-98. The rule permitted a lawyer, for example, to describe a specific practice area such as taxation law, tort law and trial practice. The attorney instead used, respectively, "tax," "personal injury" and "trials and appeals." *Id.* at 197 n.8.

164. *Id.* at 196 (citing Rule 4 of the Missouri Supreme Court Rules MO. REV. STAT.; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1978) (Index Vol.)).

165. *Id.* at 198.

166. *Id.* at 207.

167. 447 U.S. 557 (1980).

168. *R. M. J.*, 455 U.S. at 203-04 n.15.

169. *Id.* at 204-07. However, the Court was not as magnanimous where the advertisement involved its own rules and regulations:

Somewhat more troubling is appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. . . . The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of the Court.

Id. at 205.

170. *Id.* at 207. The Court stated: "We emphasize, as we have throughout the opinion,

the final step of the four-part test, that the regulation be narrowly drawn.

The *R. M. J.* Court rejected the state regulation as not being narrowly drawn, in part because the record indicated no effort by the state to regulate attorney advertising in a less restrictive manner.¹⁷¹ Apparently, regulators must establish that a prior, more tailored rule failed to accomplish their purpose.¹⁷² The effect of this sub-test for commercial speech offers the regulators an opportunity to qualify the means as least restrictive. The State of Missouri, however, had not attempted any other form of attorney advertising regulation before promulgating the regulation in *R. M. J.*¹⁷³ Accordingly, the Court, citing *Central Hudson*, invalidated the regulation and suggested areas for additional, less restrictive regulations.¹⁷⁴

While the opinion in *R. M. J.* is rather brief, it clearly expanded first amendment protection for attorney commercial speech. For example, *R. M. J.* permitted attorney advertising through mass mailings to the general public which, prior to *R. M. J.*, were prohibited.¹⁷⁵ The decision did not expressly prevent a state from regulating or prohibiting attorney advertising in other circumstances, especially those where the form of advertising itself is misleading, or where restrictions short of absolute prohibition would not have cured any possible deception.¹⁷⁶

*Zauderer v. Office of Disciplinary Counsel*¹⁷⁷ was the last attorney advertising case decided by the Supreme Court prior to *Shapero v. Kentucky Bar Association*.¹⁷⁸ *Zauderer* involved an Ohio attorney who was publicly reprimanded for four violations of the state ethics rules.¹⁷⁹ Three of the four charges involved a newspaper advertisement placed in thirty-six Ohio newspapers soliciting clients who suffered injuries as the result of a contraceptive known as the "Dalkon Shield."¹⁸⁰ The adver-

that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice."

171. *Id.* at 206.

172. *Id.*

173. *Id.* at 206 & n.20. "There is no indication in the record of a failed effort to proceed along such a less restrictive path." *Id.*

174. *Id.* at 206.

175. *Id.*

176. *Id.* at 206-07.

177. 471 U.S. 626 (1985).

178. 108 S. Ct. 1916 (1988).

179. *Zauderer*, 471 U.S. at 629, 636.

180. *Id.* at 630. The Dalkon Shield is a variety of intrauterine device that was marketed in the early 1970s. *Id.* at 630 n.2. The fourth charge involved a newspaper advertising offering to represent criminal defendants on a contingency basis who were charged with driving under the influence of alcohol. The ethics rule violated by *Zauderer* prohibited attorneys from representing criminal defendants on a contingency basis. *Id.* at 630 (citing OHIO CODE OF PROFES-

tisement featured a drawing of the allegedly defective device and read, in pertinent part:

The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women in such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.¹⁸¹

The advertisements were successful and brought Zauderer 200 responses and 106 new Dalkon Shield clients.¹⁸²

Ohio's Office of Disciplinary Counsel charged the attorney with violating three different provisions of Ohio's Disciplinary Code with this single advertisement.¹⁸³ First, the code deemed it unethical to offer unsolicited legal advice, and then accept resulting employment.¹⁸⁴ The Office of Disciplinary Counsel claimed that Zauderer's advice concerning a possible claim against the Dalkon Shield manufacturer and his offer to represent potential clients violated this rule.¹⁸⁵ Second, Zauderer's drawing in the newspaper violated an express rule prohibiting the use of illustrations in attorney advertising.¹⁸⁶ Finally, the third violation concerned certain disclosure requirements relating to contingency fee arrangements and the client's subsequent potential liability for legal costs of suit.¹⁸⁷

In its analysis, the Court applied the *Central Hudson* test to each of the violations.¹⁸⁸ However, before applying the test to the first count—offering unsolicited legal advice in a newspaper advertisement and then accepting subsequent related employment—the Court rejected the state's argument that the rationale of *Ohralik*¹⁸⁹ permitted the state to ban the advertisement outright.¹⁹⁰ In *Ohralik*, the Court had approved the ban-

SIONAL RESPONSIBILITY, DR 2-106(c)). This charge was upheld by the Supreme Court. *Id.* at 655. A discussion of the ethical issues involved in certain contingency fee arrangements is outside the scope of this Note.

181. *Id.* at 631.

182. *Id.*

183. *Id.* at 632-33.

184. *Id.* at 633.

185. *Id.* at 638.

186. *Id.*

187. *Id.*

188. *Id.* at 638-53 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). Each area of concern warranted a separate application of the *Central Hudson* test. *Central Hudson*, 447 U.S. at 556.

189. *Ohralik*, 436 U.S. at 464-66. See *supra* notes 100-19 and accompanying text for a discussion of *Ohralik*.

190. *Zauderer*, 471 U.S. at 641.

ning of in-person solicitations because of the possibility of "overreaching, invasion of privacy, the exercise of undue influence," fraud and "because it [was] not visible or otherwise open to public scrutiny."¹⁹¹ The *Zauderer* Court did not believe that the result in *Ohralik* was applicable to the facts before it because:

[P]rint advertising generally—poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.¹⁹²

After rejecting *Ohralik*, the Court then turned to the *Central Hudson* test. Applying the test to the first count, the *Zauderer* Court refused to address whether regulating this type of advertising did anything to advance a substantial governmental interest. Instead, as it did in *R. M. J.*, the Court focused on the final factor—whether the regulation was narrowly drawn—and found that the absolute ban was not sufficiently narrow.¹⁹³ Consequently, *Zauderer* should not be read to prohibit all absolute bans in the area of attorney advertising because the Court limited its holding to "print advertising . . . geared to persons with a specific legal problem" but distributed in the general public.¹⁹⁴

Next, the Court applied the *Central Hudson* test to the regulation banning illustrations from attorney advertisements.¹⁹⁵ Focusing on the third and fourth prongs of the test,¹⁹⁶ the state believed that its regulation advanced an interest in maintaining "dignity among its attorneys."¹⁹⁷ However, the Court held that the regulation reflected no substantial state interest because dignity and decorum are primarily

191. *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466 (1978)).

192. *Id.* at 642.

193. *Id.* at 644. The Court also rejected a number of arguments advanced by the state that attempted to establish circumstances warranting a ban. For example, the printed advertising does not encourage "meritless litigation," which would have required a ban. *Id.* at 643.

194. *Id.* at 641. The Court distinguished *Ohralik* because it was "in-person" as opposed to "printed," and was directed at an individual's specific legal problem as opposed to broader advertising, which did not invade "the privacy of those who read it." *Id.* at 642 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978)).

195. *Id.* at 647.

196. See *supra* notes 127-28 for a discussion of the third and fourth prongs of the *Central Hudson* test.

197. *Zauderer*, 471 U.S. at 647.

proper concerns for a courtroom.¹⁹⁸ The Court did not discuss ethical implications of the attorney engaged in advertising or the obligation of the attorney not to deceive the public. The Court did acknowledge some situations create problems with the communication and the public that could rise to an important governmental interest and regulating could be necessary.¹⁹⁹ The Court, however, refused to decide if, in those special circumstances, it would "justify the abridgment of [attorneys'] First Amendment rights."²⁰⁰ The Court concluded that the Ohio rule prohibiting the use of illustrations was unconstitutional, but retained the possibility that an illustration as a form of advertising could be regulated in a less restrictive manner, and policed on a case-by-case basis.²⁰¹

The final regulation the Court considered involved the Ohio rule concerning advertisements for attorney's services on a contingency basis. In such advertisements, the attorney must disclose details concerning the fee contemplated as well as the contingency percentages proposed. In addition, a corresponding regulation required that such advertising disclose that, under Ohio law, the losing party in litigation would be personally liable for legal costs incurred.²⁰² Thus, in essence, the regulations required that an attorney's advertisement fully disclose potential client liability.²⁰³ The Court categorized the regulation as a "disclosure requirement" imposed on the attorney who elects to advertise.²⁰⁴ Generally, there is a material difference between disclosure requirements and prohibitions or limitations on actual advertising.²⁰⁵ Disclosure regulations, the Court stated, were much more likely to pass muster under the *Central Hudson* test and be upheld as valid regulations of commercial speech.²⁰⁶ The Court reminded *Zauderer* that under prior commercial speech decisions, including *Central Hudson*, disclosure requirements had

198. *Id.*

199. *Id.* at 641. For example, the Court mentioned direct in-person solicitation as presenting "unique regulatory difficulties" supporting a substantial state interest. *Id.*

200. *Id.* at 648. But even in special circumstances, the Court was not persuaded that undignified behavior would tend to recur so often as to warrant a complete ban. *Id.*

201. *Id.* at 649. Presumably, false, misleading or fraudulent illustrations, like any form of commercial speech, could be regulated and even banned under the *Central Hudson* principles.

202. *Id.* at 635, 650; see OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A), DR 2-101(B)(15). The Court reprinted the statutes in *Zauderer*, 471 U.S. at 631-33 nn.3-4.

203. *Id.* at 653.

204. *Id.* at 650.

205. *Id.*

206. *Id.* at 651. However, disclosure requirements may be invalid where they mandate speech that actually requires the individual to ascribe to a specific political or religious position. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

constituted acceptable "less restrictive means" to further the state's substantial interest.²⁰⁷ Since deception was possible in this factual situation, the Court found the regulation to be a valid "disclosure requirement."²⁰⁸ Accordingly, the Court upheld the attorney's public reprimand so far as it was limited to the failed disclosure.²⁰⁹

Zauderer did not alter the application of *Central Hudson* in situations where the state or governmental entity attempts to regulate attorney commercial speech.²¹⁰ The four-part *Central Hudson* test, together with *Zauderer, R. M. J.*, and the Court's prior decisions concerning attorney advertising, helped to establish a framework upon which regulating agencies could form permissible regulations for its attorneys to follow. It is against this background that the *Shapero v. Kentucky Bar Association*²¹¹ decision is analyzed.

III. SHAPERO V. KENTUCKY BAR ASSOCIATION

A. The Facts

Richard D. Shapero, an attorney, wished to directly contact potential clients by mail.²¹² He drafted a brief form letter attempting to solicit the business of clients who were potentially subject to home foreclosure.²¹³ In his letter, Shapero offered a free consultation to the recipient and volunteered that "[i]t may surprise you what I may be able to do for you."²¹⁴ Shapero intended to send the letter to homeowners against

207. *Zauderer*, 471 U.S. at 650-51 n.14 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 565 (1980)).

208. *Id.* at 652. The Court stated that

[the] State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs, is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed. . . . [N]either requirement seems intrinsically burdensome; and they certainly cannot be said to be unreasonable as applied to appellant, who included in his advertisement no information whatsoever regarding costs and fee rates. This case does not provide any factual basis for finding that Ohio's disclosure requirements are unduly burdensome.

Id. at 653 & n.15.

209. *Id.* at 653-55.

210. *Id.* at 638 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). The Court reaffirmed the *Central Hudson* four-part test, verifying its applicability in attorney advertising. *Id.* at 639-49.

211. 108 S. Ct. 1916 (1988).

212. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988). The letter told the recipient that they might be surprised at what attorney Shapero could do for them. *Id.* at 1919. See *infra* text accompanying note 214 for the text of the letter.

213. *Id.* at 1919.

214. *Shapero*, 108 S. Ct. at 1919. The entire letter read:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your

whom foreclosure suits had been filed.²¹⁵

Shapero applied to the Kentucky Attorney Advertising Commission for pre-approval of the proposed form letter. The Commission, responsible for regulating attorney advertising in Kentucky, operates under the general auspices of the Kentucky Bar Association.²¹⁶ The Bar Association, in turn, is directly supervised by the State's supreme court.²¹⁷ The Commission did not find the letter false or misleading, but determined that it violated the state's attorney advertising rules that absolutely banned direct-mail solicitation of prospective clients.²¹⁸ The Commission's decision focused on Kentucky Supreme Court Rule 3.135(5)(b)(i)²¹⁹ which prohibits the practice of directly contacting potential clients who are in need of specific legal services. The decision did not focus on the content or language in Shapero's letter.²²⁰

Shapero then requested the Kentucky Bar Association to review its rule for possible constitutional defects in light of *Zauderer v. Office of Disciplinary Counsel*,²²¹ a 1985 case decided by the Supreme Court of the United States concerning attorney advertising.²²² The Ethics Committee of the Bar reviewed the rule and, in an opinion adopted by the Kentucky State Bar, refused to approve Shapero's form letter.²²³ The Committee found that the questioned rule was not unconstitutional because it was consistent with the American Bar Association's (ABA) Model Rules of Professional Conduct.²²⁴ Moreover, the State's Bar Association and

home by ORDERING your creditor [sic] to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Id. (emphasis in original).

215. *Id.*

216. *Id.* at 1919 n.1.

217. KY. SUP. CT. R. 3.135 (1988).

218. *Shapero*, 108 S. Ct. at 1919-20 (citing KY. SUP. CT. R. 3.135(5)(b)(i) (1988)).

219. KY. SUP. CT. R. 3.135(5)(b)(i) reads:

A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id.

220. *Shapero*, 108 S. Ct. at 1919.

221. 471 U.S. 626 (1985).

222. See *supra* notes 178-209 and accompanying text for a discussion of *Zauderer*.

223. *Shapero*, 108 S. Ct. at 1920.

224. *Id.* See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983), which states:

Kentucky Supreme Court believed the recently promulgated ABA Model Rule was constitutionally consistent with the current Supreme Court of the United States decisions in the area of commercial speech.²²⁵

Unsatisfied, Shapero requested that the Kentucky Supreme Court review the Bar Association's decisions prohibiting his form letter and refusing to invalidate the Kentucky Supreme Court rule.²²⁶ The court issued a three-part ruling.²²⁷ First, the court held that the challenged attorney advertising rule conflicted with the ruling in *Zauderer*, and ordered it deleted.²²⁸ Second, the court adopted American Bar Association Model Rule 7.3.²²⁹ The court believed the rule was sufficiently narrowly drawn to constitutionally ban direct solicitation without violating the first amendment.²³⁰ Finally, the court reviewed Shapero's letter in light of the newly adopted rule, and concluded that the practice of direct-target mail client solicitation was fraught with dangers of overreaching, intimidation, and potentially misleading conduct so as to justify an absolute "prophylactic" ban.²³¹

The Supreme Court of the United States granted certiorari²³² to resolve the question of whether direct-target mail solicitation of potential clients may be banned under the first amendment.²³³ The Court held that an absolute ban of a lawyer's direct-mail solicitation was prohibited and did not conform with the commercial speech doctrine.²³⁴

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, *by mail*, in-person or otherwise when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, *by letter* or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Id. (emphasis added).

225. *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300-01 (1986), *rev'd*, 108 S. Ct. 1916 (1988). The Model Rules were adopted by the ABA in 1983 after several years of debate and review by the Association's special Kutak Commission, named after the late chair of the Commission, Robert Kutak. See Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503 (1982).

226. *Shapero*, 108 S. Ct. at 1920. The Kentucky Supreme Court has the authority to review a formally adopted Bar Association opinion. KY. SUP. CT. R. 3.530 (1988).

227. *Shapero*, 726 S.W.2d 299.

228. *Id.* at 300.

229. *Id.* at 301. See *supra* text accompanying note 224 for text of the Model Rule 7.3.

230. *Shapero*, 726 S.W.2d at 301.

231. *Id.*

232. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 64 (1987).

233. *Shapero*, 108 S. Ct. at 1920.

234. *Id.* at 1924-25. The commercial speech doctrine offers mid-level protection for adver-

B. Reasoning of the Court

1. Majority opinion

In *Shapero v. Kentucky Bar Association*,²³⁵ the Supreme Court held that an attorney's direct solicitation of clients through the mail constitutes commercial speech protected by the first amendment and therefore, may not be banned.²³⁶ Specifically, the majority rejected the ban on direct-mail advertising provided in Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct, which had been adopted by the Kentucky Supreme Court.²³⁷

Justice Brennan, writing for the *Shapero* majority, offered several broad reasons for finding a total bar on attorneys' direct-mail solicitation unconstitutional.²³⁸ First, the Court applied a significantly watered down version of the four-part test of commercial speech originally stated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²³⁹ As previously noted,²⁴⁰ this test requires that rules regulating commercial speech that is not deceptive, misleading or false be narrowly drawn and advance a substantial state interest.²⁴¹ As long as the regulation furthers a substantial governmental interest and is narrowly drawn to be only as restrictive as necessary, the test permits absolute bans on commercial advertising.²⁴²

Applying the *Central Hudson* test, the Court noted the first step—that the speech must concern lawful activity and not be misleading—only in passing because the Bar Association never claimed that *Shapero's* letter was misleading, overreaching, false or deceptive.²⁴³ The majority agreed and proceeded directly to the final step of the test.²⁴⁴ The Court held that the Kentucky Supreme Court rule violated the first amendment because the regulation was not narrowly drawn to meet a substantial governmental interest. The Court reasoned that far less restrictive means

tising and other forms of speech where the primary motivation is pecuniary. For a discussion of the modern treatment of commercial speech, see *supra* notes 36-141 and accompanying text.

235. 108 S. Ct. 1916 (1988).

236. *Id.* at 1923-25.

237. *Id.* See *supra* note 224, for a text of Model Rule 7.3. It is now presumed that Rule 7.3 of the Model Rules of Professional Conduct is unconstitutional to the extent it bans all direct-mail solicitation. *Shapero*, 108 S. Ct. at 1924.

238. *Shapero*, 108 S. Ct. at 1924-25.

239. 447 U.S. 557 (1980).

240. See *supra* notes 121-41 and accompanying text.

241. *Central Hudson*, 447 U.S. at 566.

242. *Shapero*, 108 S. Ct. at 1920. See *supra* notes 121-41 and accompanying text.

243. *Id.* at 1919, 1921.

244. *Id.* at 1919; see also *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300 (Ky. 1987), *rev'd*, 108 S. Ct. 1916 (1988).

could accomplish many of the state's goals in regulating abuses.²⁴⁵ In this particular circumstance, a blank form letter, pre-approved by the local bar organization could serve in furthering these important goals.²⁴⁶ The balance of the four-part *Central Hudson* test and its logic was not applied.²⁴⁷

Second, the *Shapero* Court distinguished in-person solicitation from other written advertising approved in its prior decisions.²⁴⁸ Comparing the facts in *Shapero* with *Ohralik v. Ohio State Bar Association*²⁴⁹ and *Zauderer v. Office of Disciplinary Counsel*,²⁵⁰ the Court found *Shapero*'s factual situation more consistent with *Zauderer* in every respect.²⁵¹ The *Shapero* Court stated that the facts did not parallel *Ohralik* because a writing is not similar to an in-person solicitation.²⁵² While the "unique features of in-person solicitation [present in *Ohralik*] justif[y] a prophylactic rule," the Court stated that these features were not present in direct-mail solicitation.²⁵³ The Court contended that the distinction is most obvious from a potential client's perspective, which is significant since the potential client is the party the state is attempting to protect. If a potential client is contacted in person, he or she may be impaired, or he or she may feel overwhelmed by the particular situation.²⁵⁴ On the other hand, the recipient of a letter can ignore, destroy or defer consideration of the attorney's correspondence.²⁵⁵ The majority also found relevant the distinction between private, unrecorded, in-person solicitations which are undeniably impossible to police, and direct-mail letters which can be retrieved later by an investigating agency for review.²⁵⁶

Moreover, the Court noted that prior to *Shapero*, it had struck down regulations banning mass mailings to the general public in *In Re R. M. J.*²⁵⁷ The Court felt that *Shapero* was really being punished for his effi-

245. *Shapero*, 108 S. Ct. at 1923-24.

246. *Id.*

247. *Id.* at 1921-24.

248. *Id.* at 1921.

249. 436 U.S. 447 (1978).

250. 471 U.S. 626 (1985).

251. *Shapero*, 108 S. Ct. at 1921.

252. *Id.* at 1922.

253. *Id.*

254. *Ohralik*, 436 U.S. at 465-67.

255. *Shapero*, 108 S. Ct. at 1922-23.

256. *Id.* at 1923; see also *Zauderer*, 471 U.S. at 641. The *Zauderer* Court characterized the in-person situation activity in *Ohralik* as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud." *Id.* Further the *Zauderer* Court noted that the activity in *Ohralik* was "virtually immune" from realistic observation and supervision. *Id.*

257. 455 U.S. 191 (1981).

ciency; why should the Constitution prevent the banning of a mass mailing yet allow a target letter to those who could directly benefit from the attorney's services?²⁵⁸ The Court concluded that a written advertisement does not substantially infringe upon an individual's privacy rights, and privacy invasion occurs only when the legal problems are discovered by the attorney, not when a solicitation letter is received.²⁵⁹ The majority in *Shapero* reasoned that holding the rule unconstitutional was nothing more than a logical extension of earlier attorney advertising decisions: As long as the advertisement was not deceptive, misleading or false, the Constitution prohibits a state from banning such a communication.²⁶⁰

Third, the Court reviewed the issues involved in direct-mail regulation, and concluded that since some less restrictive means appeared available, the state was not practically limited to an absolute ban to achieve its purpose.²⁶¹ In this portion of the Court's opinion, Justice Brennan acknowledged that certain problems exist when an attorney directly solicits clients through the mails.²⁶² The Court then proceeded to list alternatives available to the state.²⁶³ These alternatives included: informing the recipient on how to report inaccuracies or letters that are misleading; requiring the attorney to state clearly the nature of a soliciting letter; and, requiring the soliciting lawyer to retain copies of all direct-mail letters by requiring that the attorney produce the letters at any disciplinary

258. *Shapero*, 108 S. Ct. at 1921. The Kentucky Supreme Court prohibited the letter "solely because it targeted only persons who were 'known to need [the] legal services' offered." *Id.* (quoting *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 301, *rev'd*, 108 S. Ct. 1916 (1988)).

259. *Id.* at 1923. However, the privacy concerns present a rather compelling argument in favor of an absolute ban. For a further discussion of the privacy issues involved, see *infra* notes 344-51 and accompanying text.

260. *Shapero*, 108 S. Ct. at 1921. The Court stated:

Thus, Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on."

Id.

261. *Id.* at 1922-24.

262. *Id.* at 1923. For example, recipients may believe a lawyer is more familiar with their specific legal problems than he or she actually is. The Court hypothesized that a recipient could be led to believe a more serious or "dire" legal problem exists when the situation is really quite minor or does not exist. *Id.* (citing *Leoni v. State Bar of California*, 39 Cal. 3d 609, 619-20, 704 P.2d 183, 189, 217 Cal. Rptr. 423, 429 (1985), *summarily dismissed*, 475 U.S. 1001 (1986) (attorney sent mass mailings to defendants in all types of civil actions offering bankruptcy information)).

263. *Id.* at 1923-24.

proceedings.²⁶⁴ The Court acknowledged that increased responsibilities in supervising direct-mail letters would be the natural result of a regulating agency imposing permissible restrictions, but were required because [o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.²⁶⁵

In the final portion of the opinion only, Justice Brennan, not joined by a majority of the Court, wrote his opinion of exactly how limited the states were with regard to regulating commercial speech.²⁶⁶ Justice Brennan began by agreeing with Shapero's argument that his letter was absolutely protected by the first amendment.²⁶⁷ He rejected the Bar Association's argument that Shapero's letter was converted into "high pressure solicitation," and was essentially overbearing.²⁶⁸ Then Justice Brennan suggested no limitation would be permitted if the advertisement is truthful.²⁶⁹ In fact, he stated:

[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business.²⁷⁰

Finally, Justice Brennan suggested that he would permit a state to limit even potentially misleading attorney advertising only if the state could establish a substantial interest in its regulation.²⁷¹

264. *Id.* at 1924.

265. *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)). The Court also rejected the bar association's reliance upon earlier decisions to support bans on direct-mail solicitation. The case most often relied upon by Shapero was *Ohralik v. Office of Disciplinary Counsel*, 436 U.S. 447 (1978).

266. *Shapero*, 108 S. Ct. at 1924-25. Justices White and Stevens, who concurred with the Court's judgment, dissented from the final portion of Brennan's opinion. *Id.* at 1925 (White, J., concurring and dissenting in part).

267. *Id.* at 1924.

268. *Id.*

269. Initially, Justice Brennan stated that pitch, style or typeface would, under no circumstances, reach a threshold of deceptive speech as long as the contents were truthful. *Id.*

270. *Id.*

271. *Id.* To establish a substantial state interest in regulating, the state would have to show that the speech is misleading and material. Not all misleading speech involves materiality. Absent materiality, the advertisement does not invoke a state's substantial interest. Presuma-

The majority concluded that the State Bar of Kentucky was unable to establish that Shapero's direct-mail solicitation was misleading.²⁷² Utilizing the logic of *Zauderer*, the *Shapero* Court decided that the regulation failed to further any substantial state interest and, therefore, the absolute ban could not be upheld.²⁷³ The majority remanded the case, giving the Bar Association an opportunity to establish criteria as set out in the majority opinion.²⁷⁴

2. Dissenting opinion

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the majority's holding that an absolute ban on direct-mail solicitation of clients violated the first amendment commercial speech doctrine.²⁷⁵ Moreover, the dissent attacked the majority's reasoning, its reliance on *Zauderer v. Office of Disciplinary Counsel*,²⁷⁶ and generally criticized the commercial speech doctrine itself. Finally, the dissent criticized the majority for failing to apply the four-part commercial speech test formulated in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*.²⁷⁷

The dissent perceived two primary flaws of omission in the majority's reasoning. First, the dissent contended that the Court failed to recognize that attorney advertising involves conduct that is inherently likely to mislead the public, at least more so than where the mere "sale of ordinary consumer goods" is involved.²⁷⁸ Where a direct-mail letter is addressed by a vendor of standardized products, the recipient understands that the nature of the relationship is merely one of consumer and seller. Where the relationship is that of an attorney and a potential client, the public assumes that ethical principles demand that the lawyer put the client's interest before his or her own; therefore, the situation is ripe for

bly Justice Brennan intended the key element to be "materiality," because Justice Brennan would not permit regulation of misleading yet "relatively uninformative facts." *Id.* at 1925. It is important to note that Justice Brennan, joined by Justices Marshall, Blackmun and Kennedy, would have significantly limited restrictions on regulating commercial speech. *Id.* at 1924-25.

272. *Id.* at 1919.

273. *Id.* at 1921-24.

274. *Id.* After the Court's decision, Shapero continued to have difficulty with the proposed form letter. The Kentucky Bar Association refused to approve at least twelve letters Shapero submitted, primarily because they were believed to overreach or mislead the recipient. Wall St. J., Aug. 30, 1988, § 2, at 21, col. 1.

275. *Shapero*, 108 S. Ct. at 1925 (O'Connor, J., dissenting).

276. 471 U.S. 626 (1985).

277. 447 U.S. 557 (1980).

278. *Shapero*, 108 S. Ct. at 1925 (O'Connor, J., dissenting).

abuse.²⁷⁹

Second, the dissent believed that the majority also failed to recognize particular problems involving legal advertising and solicitation.²⁸⁰ In particular, by its very nature, direct-mail solicitation invites lawyers to overreach by offering incomplete and *not* disinterested unsolicited advice to attract clients.²⁸¹ The dissent claimed that an attorney is likely to place his or her own pecuniary interest ahead of the client's goals by providing advice tailored to secure the client.²⁸² Accordingly, the state's interest is substantial and the state could permissibly ban the form of advertising.²⁸³ In general, some forms of attorney advertising have frustrated the states' legitimate interest in removing public distrust of lawyers and the legal system.²⁸⁴ In many ways, advertising has skewed the public's impression of all attorneys because some have selected offensive forms of advertising.

Justice O'Connor also took issue with the majority's reliance on *Zauderer*. She conceded that *Zauderer* supported the majority's position; however, she argued that *Zauderer* was poorly reasoned and based upon faulty premises.²⁸⁵ *Zauderer* was incorrect because it exceeded the permissible limitations allowable to commercial speech, and granted more protection than existed under the Constitution.²⁸⁶ The dissent suggested that she would possibly overrule all of the attorney advertising decisions, if provided with the opportunity.²⁸⁷

The dissent further argued that the majority exceeded even *Zauderer* in providing unwarranted constitutional protection to attorney advertising.²⁸⁸ There was, according to the dissent, a higher likelihood that zealous attorneys' personalized letters would distort the judgment of lay people than would a newspaper advertisement.²⁸⁹ Further, the targeted recipient as a member of the general public has few contacts with the judicial system and is thus likely to be intimidated by the lawyer's perceived authority. The dissent believed that it is significantly

279. *Id.* at 1926 (O'Connor, J., dissenting).

280. *Id.* (O'Connor, J., dissenting).

281. *Id.* (O'Connor, J., dissenting).

282. *Id.* (O'Connor, J., dissenting).

283. *Id.* (O'Connor, J., dissenting).

284. *Id.* at 1927 (O'Connor, J., dissenting).

285. *Id.* at 1925-26 (O'Connor, J., dissenting) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 639-47 (1985)).

286. *Id.* at 1925-26 (O'Connor, J., dissenting).

287. *Id.* (O'Connor, J., dissenting).

288. *Id.* (O'Connor, J., dissenting).

289. *Id.* (O'Connor, J., dissenting).

more difficult to ignore a letter than a newspaper advertisement.²⁹⁰

Justice O'Connor then compared the direct-target mail solicitation of *Shapero* with *Ohralik v. Ohio State Bar Association*.²⁹¹ In *Ohralik*, the Court prohibited in-person solicitation, but still accepted some degree of protected commercial speech.²⁹² Justice O'Connor criticized the majority for overlooking the obvious logical similarities, such as the direct and personal nature of the solicitation focusing on a single individual.²⁹³

The dissent then focused on the general flaws in the commercial speech doctrine. While accepting political speech as the "core of the First Amendment," the dissent pointed out that, historically "the constitutional fence around this metaphorical market-place of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation."²⁹⁴ Thus, the dissent claimed that commercial speech has never held the same constitutional status as political speech.²⁹⁵

The dissent also questioned the apparent inability of the majority to apply the legal test established by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*²⁹⁶ to the facts of *Shapero*.²⁹⁷ The dissent then applied the four-part test and concluded that the state restrictions were permissive because of the state's substantial interest in protecting its consumer citizens from the potentially misleading effects of targeted direct-mail advertising.²⁹⁸ Justice O'Connor specifically found that even if the advertising was not unlawful or *per se* misleading, the Kentucky State Bar Association had a substantial interest in its regulation.²⁹⁹ Moreover, Justice O'Connor found that the ABA Model Rule 7.3, adopted in Kentucky, was narrowly drawn to meet those interests and could constitutionally ban *Shapero's* direct-mail letters.³⁰⁰ The dissent did not believe that the regulation was more extensive than necessary because the underlying compelling interest of protecting the public, demanded such broad restriction.³⁰¹

290. *Id.* (O'Connor, J., dissenting).

291. 436 U.S. 447 (1978).

292. *Id.* at 455.

293. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

294. *Id.* at 1926-27 (O'Connor, J., dissenting) (citing *Boos v. Berry*, 108 S. Ct. 1157 (1988)).

295. *Id.* (O'Connor, J., dissenting).

296. 447 U.S. 557 (1980).

297. *Shapero*, 108 S. Ct. at 1927-28 (O'Connor, J., dissenting). See *supra* notes 120-41 and accompanying text for a discussion of the *Central Hudson* four-part test.

298. *Shapero*, 108 S. Ct. at 1928 (O'Connor, J., dissenting).

299. *Id.* (O'Connor, J., dissenting).

300. *Id.* (O'Connor, J., dissenting).

301. *Id.* (O'Connor, J., dissenting).

The dissent then turned its attention to the flaws in other attorney advertising cases. It characterized *Bates v. State Bar of Arizona*³⁰² as a problematic experiment which could now fail under the four-part test set out in *Central Hudson*.³⁰³ The dissent focused on the economic motivation that prompted many attorneys to solicit legal business through various legal advertising techniques.³⁰⁴ Troubled by underlying economic motivational factors, the dissent reminded attorneys that:

unlike other occupations that may be equally respectable, . . . membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life.³⁰⁵

Thus, Justice O'Connor supported the state restrictions on attorney advertising.³⁰⁶ She believed that a lawyer cannot follow the rules of professional conduct, which separate the legal profession from trades and occupations, and at the same time advertise legal services to the public.³⁰⁷

In the final part of its analysis, the dissent criticized the majority's reasoning that attorney advertising in general, benefits consumers of legal services and should be considered as protected commercial speech.³⁰⁸ Observing that attorneys are officers of the court, and must place the interests of their clients above their own pecuniary interests, Justice O'Connor wrote:

[T]his Court's recent decisions reflect a myopic belief that "consumers", and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. . . . In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it

302. 433 U.S. 350 (1977).

303. *Shapero*, 108 S. Ct. at 1929 (O'Connor, J., dissenting).

304. *Id.* (O'Connor, J., dissenting). "The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles." *Id.* (O'Connor, J., dissenting); see also Hazard, Peirce & Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983) [hereinafter Hazard].

305. *Shapero*, 108 S. Ct. at 1929 (O'Connor, J., dissenting).

306. *Id.* (O'Connor, J., dissenting).

307. *Id.* at 1929-30 (O'Connor, J., dissenting).

308. *Id.* at 1931 (O'Connor, J., dissenting).

is too late to effect a worthwhile cure.³⁰⁹

IV. ANALYSIS

The analysis of the Court in *Shapero v. Kentucky Bar Association*³¹⁰ contained several fundamental flaws. First, the Court failed to account for the important underlying, conflicting principles inherent in the regulation of direct-mail solicitation. Second, the Court made an awkward analytical jump from its reasoning in prior commercial speech cases to that in *Shapero*. Finally, the *Shapero* majority and dissent failed to properly apply the four-part test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.³¹¹ This section examines these fundamental flaws. In addition, this section explains that under the circumstances of *Shapero* the so called "prophylactic ban" on all direct-target mail advertising/solicitation would not have been upheld under the *Central Hudson* test for commercial speech. Therefore, while the result reached in *Shapero* was correct, the Court failed to apply the proper analysis. By failing to properly analyze the regulation at issue, the Court has left it unclear as to how states are to devise attorney advertising regulations that will withstand constitutional scrutiny.

A. *Conflicting Principles Inherent in Regulating Attorney Advertising*

1. Ethical considerations of attorney advertising

The *Shapero v. Kentucky Bar Association*³¹² Court failed to identify and focus on the ethical obligations that a lawyer owes to society.³¹³ Ethical and disciplinary rules for attorneys were first established on a national level at the beginning of this century.³¹⁴ The purpose of these regulations was to guide the ethical lawyer and establish uniform disciplinary rules to punish the unethical attorney.³¹⁵ The Modern Code of Professional Responsibility, promulgated by the American Bar Association (ABA), broadly states the purpose behind these rules:

The continued existence of a free and democratic society de-

309. *Id.* (O'Connor, J., dissenting) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370-72 (1977) (Powell, J., concurring in part and dissenting in part)).

310. 108 S. Ct. 1916 (1988).

311. 447 U.S. 557 (1980).

312. 108 S. Ct. 1916 (1988).

313. The ethical obligations are presently stated in the ABA MODEL RULES, *supra* note 153. See *infra* notes 317-34 and accompanying text for a discussion of the ethical obligations an attorney has when engaging in advertising and solicitation.

314. ABA CANON OF PROFESSIONAL ETHICS Canon 27 (1908), *reprinted in* 33 A.B.A. REP. 566, 582 (1908); *see also* H. DRINKER, LEGAL ETHICS 123-25 (1954).

315. ABA CANON, *supra* note 314.

pend upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. . . . Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.³¹⁶

The rules against advertising evolved from the English system, were rooted in basic professional courtesy and obligations to the client,³¹⁷ and were formulated primarily to eliminate the practices of common-law maintenance, champerty and barratry.³¹⁸ The fear that the attorney would place his or her pecuniary interest above that of the client was a primary motivating force which prompted the enactment of rules prohibiting these practices. The rules today require that the lawyer's obligation to his or her own client be placed before all other interests.³¹⁹ The problem is obvious: An ethical attorney is restrained from advertising because he or she may run the risk of abusing the ethical rules designed to subordinate his or her pecuniary interests to the interests of the client.³²⁰

Prior to *Bates v. State Bar of Arizona*,³²¹ where the Supreme Court held absolute bans on attorney advertising are unconstitutional, many states followed the ABA disciplinary rules prohibiting advertising.³²²

316. MODEL CODE, *supra* note 154, preamble.

317. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985).

318. *In Re Primus*, 436 U.S. 412, 424 n.15 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)). Maintenance is the practice of helping another set up a lawsuit. Champerty is encouraging or soliciting another to bring a lawsuit for a specific action. Barratry is the ongoing practice of champerty and/or maintenance; see also 4 W. BLACKSTONE, COMMENTARIES *134-36; Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 969-70 (1967) for a discussion of the origin of the common-law ethical rules.

319. MODEL CODE, *supra* note 154, DR 5-105; MODEL RULES, *supra* note 153, Rule 1.7 comment 5.

320. MODEL RULES, *supra* note 153, Rule 1.7. An attorney is obliged to subordinate all interests adverse or potentially adverse to his or her own client's cause. *Id.* It follows that an attorney's own pecuniary interest must be properly placed beneath the client's concern. *Id.* at comment 6 ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."); see also, MODEL CODE, *supra* note 154, DR 5-105(C).

321. 433 U.S. 350 (1977).

322. See Hazard, *supra* note 304, at 1084 n.2, for a discussion of the nationwide attorney advertising ban that preceded the *Bates* decision.

After *Bates*, state rules and the ABA model disciplinary code slowly changed to reflect the decision.³²³ The rules did not abolish all advertising restrictions and generally permitted advertising limited to the spirit of *Bates*.³²⁴ After *Bates*, there are no general roadblocks to an attorney actually advertising his or her services in a truthful, nonmisleading, legal manner.³²⁵ While certain forms of advertising may be regulated, an attorney has ample avenues to convey his or her message to the public.³²⁶ For example, an attorney may advertise in the newspaper,³²⁷ on radio and television,³²⁸ in the telephone directory,³²⁹ through mass general mailings,³³⁰ or by placing his or her name with nonprofit lawyer referral services.³³¹

The new rules, however, continued to prohibit the practice of soliciting clients and accepting employment after providing unsolicited advice to a non-client.³³² Soliciting clients includes in-person contact similar to the complained conduct in *Ohralik v. Ohio State Bar Association*,³³³ and the practice of direct-mail solicitation, such as in *Shapero*.³³⁴ A comment to the Model Rules of Professional Conduct explains the rationale behind the ban on solicitation:

The situation is . . . fraught with the possibility of undue influence, intimidation, and over-reaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.³³⁵

The first ethical consideration behind regulations restricting advertising

323. MODEL RULES, *supra* note 153, Rule 7.2(a). Rule 7.2(a) states that: "Subject to the requirements of rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in rule 7.3." *Id.*

324. *Id.*

325. *Bates*, 433 U.S. at 383-84.

326. R. ROTUNDA, *supra* note 14, § 20.31 at 147.

327. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

328. MODEL RULES, *supra* note 153, Rule 7.2(a). See *supra* text accompanying note 323, for text of Rule 7.2(a).

329. *In Re R. M. J.*, 455 U.S. 196, 206-07 (1982).

330. *Id.* at 206.

331. MODEL RULES, *supra* note 153, Rule 7.2(a).

332. *Id.* Rule 7.3.

333. 436 U.S. 447, 454 (1978).

334. *Shapero*, 108 S. Ct. at 1919.

335. MODEL RULES, *supra* note 153, Rule 7.3 comment 2.

and solicitations concerns the need to prevent attorneys from subordinating the interests of potential clients' to their own.

The second ethical concern of the organized bar is reflected in the rule prohibiting the practice of accepting employment after offering unrequested advice.³³⁶ Both the rule against direct in-person solicitation and the rule against offering unsolicited advice to non-clients and then accepting employment reflect the traditional prohibition of practicing barratry.³³⁷ They also reflect the concern that the layperson be protected from attorneys who are willing to sacrifice a client's interest for their own pecuniary gain.³³⁸ As *Bates* and its progeny have pushed back the boundary line for permissible restrictions on advertising and solicitation, lawyers motivated by their own pecuniary interests have moved in to fill the void.³³⁹ Public dislike for attorneys who abuse the system clearly indicates some regulations are necessary to assure continued respect for the profession.³⁴⁰ Thus, regulations are needed to ensure that attorneys do not subordinate the interests of their clients.

2. The public's interests in receiving attorney advertising

While the ethical considerations and disciplinary rules regulate the profession, the public's interests in being informed about attorney services are of primary importance. There must be a marketplace for ideas in order for the public to become knowledgeable about general legal services.³⁴¹ Without advertising, it is possible that a large percentage of the population would be unaware of specific attorney services, costs and availability.³⁴² Generally, dissemination of information is valuable and important to the consumer, and represents the primary conceptual roadblock to enacting regulations on attorney advertising.³⁴³

336. *Id.* Rule 1.7.

337. See *supra* text accompanying note 318 for a definition of barratry.

338. One point of view holds that the reason behind advertising is purely economic, and that the pecuniary interest of the attorney advances advertising. See Hazard, *supra* note 304.

339. See e.g., *In Re Von Wigen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 163 (1984), *cert. denied*, 472 U.S. 1007 (1985) (attorney solicited victims of mass disaster by sending direct-mail advertisement claiming appointment as special counsel for victims and families).

340. See Cox, *A Low Key Meeting for California Bar*, Nat'l L. J., Oct. 10, 1988, at 3, col. 1; Scott, *Attorneys Want To Polish Image*, United Press Int'l, July 25, 1988, (morning ed.).

341. *Bates*, 433 U.S. at 376.

342. *Id.* at 373-74; see also Hazard, *supra* note 304, at 1084.

343. *Zauderer*, 471 U.S. at 646:

Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising

While attorney advertising and solicitation serve to enlighten the public, there also exist concerns that the public may become subjected to invasions of privacy, overreaching, and misleading practices by the advertising or soliciting attorney.³⁴⁴ In *Ohralik*, the privacy issue involved an attorney who visited potential clients at the hospital and at home while recuperating.³⁴⁵ Privacy may be invaded in a number of ways, and different persons may require differing degrees of privacy protection.³⁴⁶ The *Shapero* Court stated that privacy concerns arise only in situations where the potential client is confronted with direct in-person solicitation.³⁴⁷

Privacy, however, is not limited to situations where a lawyer, his representative, or a direct-target solicitation letter shows up on an individual's doorstep. Even the *Shapero* majority conceded that an invasion of privacy may occur when the soliciting lawyer or his representative seeks out public or private information concerning an individual's personal or professional legal troubles in anticipation of procuring the person as a client.³⁴⁸ For example, suppose a motorist arrested for driving while intoxicated receives a letter the next day from an attorney offering representation. Unaware the arrest report has been released to the attorney, the motorist is made to feel additional, unnecessary humiliation upon finding out.³⁴⁹ While certain matters may be contained in public records, other possible claims and actions may be discoverable with minimal efforts to industrious lawyers.³⁵⁰ If attorneys can solicit in this manner, they are encouraged to invade a person's privacy. By regulating attorney solicitation, the ability or incentive to invade a potential client's

Id.

344. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978).

345. *Id.* at 450-51.

346. See generally R. ROTUNDA, *supra* note 14, § 20.36, for a discussion of the varying privacy concerns present in constitutional law.

347. *Shapero*, 108 S. Ct. at 1922-23. The Court treated privacy interests in a targeted mailing as equal to a general mailing, and stated: "Nor does a targeted letter invade the recipient's privacy more than does a substantively identical letter mailed at large." *Id.* at 1923.

348. *Id.*

349. See Wall St. J., July 5, 1988, § 2 at 21, cols. 3-6. Within 72 hours after being arrested for driving under the influence of alcohol, one individual received five letters from lawyers who were "eager" to represent him. *Id.* A lawyer in Washington, D.C. combs police files weekly and sends out letters to potential clients charged with serious traffic offenses. *Id.* In four years this attorney has been retained by over 2000 clients who were contacted in this manner. *Id.*

350. *Id.* Some unethical attorneys pay fees to ambulance drivers, tow truck operators, emergency room employees and city and state governmental employees for names and addresses of persons with legal problems. This practice of "capping" is generally forbidden and is considered criminal activity in some jurisdictions. See CAL. BUS. & PROF. CODE §§ 6152-6153 (West 1974 & West Supp. 1989).

privacy will be reduced if not removed.³⁵¹

Another public concern is preventing attorneys from overreaching or misleading a layperson or exploiting his or her lack of knowledge.³⁵² The primary argument discounting the presence of these problems in direct-mail solicitation is that the reader can “‘effectively avoid further bombardment of [his or her] sensibilities simply by averting [his or her] eyes.’”³⁵³ However, there are four flaws in this argument. First, the recipient is likely to be entrenched in a real legal problem when he or she receives the letter.³⁵⁴ Justice O'Connor has noted that the emotional stress of a particular situation can “overpower the will and judgment of laypeople who have not sought” the advice of counsel.³⁵⁵ The position of influence an attorney holds in modern society builds into the letter authority and prestige, making it more difficult to “put [the letter] in a drawer to be considered later, ignored, or discarded.”³⁵⁶

Second, the letter itself is likely to convince a layperson that the attorney has some superior and particular knowledge concerning that individual's personal legal problem.³⁵⁷ Absent some type of insider infor-

351. The proposal section of this Note discusses various regulations, which, if implemented, would address the privacy concerns by regulating the practice. Anytime an individual is specifically selected because of potential legal problems, privacy concerns are triggered. By regulating the practice, the potential client is more likely to be protected from unwarranted invasions. See *infra* notes 463-502 and accompanying text for a thorough discussion.

352. *Shapero*, 108 S. Ct. at 1925-26 (O'Connor, J., dissenting).

353. *Id.* at 1922-23 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

354. See *Leoni v. State Bar of Cal.*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *summarily dismissed*, 475 U.S. 1001 (1986) (attorneys sent out many letters to defendants in pending lawsuits offering advice concerning bankruptcy); see also *In Re Von Weigen*, 481 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985) (attorney obtained list of victims of Kansas City hotel collapse disaster; letters written offering advice and representation claimed attorney was appointed by fictitious committee).

355. *Zauderer*, 471 U.S. at 678 (O'Connor, J., concurring in part, concurring in the judgment, and dissenting in part).

356. *Shapero*, 108 S. Ct. at 1923. The majority did not believe a direct-mail letter was inherently overpowering or misleading, but believed the recipient *could* put the letter in a drawer and discard it. *Id.* The dissent in *Shapero*, however, disagreed with the majority:

For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and its officers, may therefore find it much more difficult to ignore an apparently “personalized” letter from an attorney than to ignore a general advertisement.

Id. at 1926 (O'Connor, J., dissenting).

357. *Id.* (O'Connor, J., dissenting). Consider the letter in *Shapero*, which indicated that Shapero knew the recipients were in the middle of a foreclosure action and offered to help prevent the recipient from losing his or her home. *Id.* at 1919. Near the conclusion of the letter, Shapero simply stated, “It may surprise you what I may be able to do for you.” *Id.* With the combination of knowledge and an apparent promise, a recipient could find it more difficult to ignore this “personalized” correspondence. *Id.* at 1926 (O'Connor, J., dissenting).

mation, it is highly unlikely an attorney would have special knowledge concerning that person's specific legal problem.³⁵⁸ The letter, however, creates an inference that the attorney is specially knowledgeable and able to offer assistance because he or she knows about the problem.³⁵⁹

Third, the layperson is not likely to report the attorney to disciplinary authorities if he or she claims to be able to assist in their problems. The attorney's conduct becomes "not visible or otherwise open to public scrutiny."³⁶⁰ The *Shapero* majority suggested subsequent review and post-facto policing for reported and investigated complaints.³⁶¹ The Court, however, failed to address situations where the attorney's letter may have misled someone, caused someone to overreact or invaded personal or professional privacy, yet still succeeded in procuring the individual as a client. Successful representation would not relieve the attorney from his ethical obligation, nor would it obviate disciplinary charges.³⁶² Finally, the lawyer who sends a letter may offer advice serving the lawyer's own pecuniary interests rather than containing advice specifically addressing the client's needs, desires or goals.³⁶³ An attorney may abuse the privacy of such a communication by encouraging litigation and other lawyer involvement, rather than suggesting non-litigation remedies which may better serve the client's interests.³⁶⁴

3. Regulating direct-mail solicitation serves to advance the underlying principles

In reality, an absolute ban on direct-target mail solicitation evolved as a "manner" restriction affecting the form of an attorney's advertise-

358. See MODEL RULES, *supra* note 153, Rule 1.1, which reads: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Mere knowledge of a recipient's particular legal problem does not make an attorney competent to handle a legal case. In an accompanying comment, the circumstances are more fully defined:

[R]elevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id. comment 1.

359. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

360. *Ohralik*, 436 U.S. at 466.

361. *Shapero*, 108 S. Ct. at 1924.

362. The Model Rules do not excuse the attorneys from their ethical obligations merely because of successful representation. MODEL RULES, *supra* note 153, Rule 7.3 comment 5.

363. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

364. See *supra* notes 314-34 and accompanying text for a discussion concerning the attorney's pecuniary gain.

ment.³⁶⁵ As discussed above,³⁶⁶ many forms of advertising are now open to attorneys. The regulation struck down in *Shapero* prevented only one manner of advertising: direct-target mail solicitation.³⁶⁷ The lawyer's message to prospective clients could indeed reach his or her audience through other available avenues.³⁶⁸

This section of the analysis has discussed four general principles that constitute the concerns underlying regulating direct-mail solicitation. They are: (1) an ethical attorney has an obligation to not overreach or mislead when soliciting or advertising for specific cases from non-clients;³⁶⁹ (2) the public is vulnerable to those attorneys willing to place their own pecuniary gain before the client's specific legal problem;³⁷⁰ (3) the privacy of an individual with a specific legal problem may be invaded when the attorney ferrets out this problem and again when he or she sends a solicitation letter to the individual;³⁷¹ and (4) the attorney's first amendment rights are not unduly infringed upon because other forms of advertising remain available.³⁷² All are properly served by regulating and controlling direct-target mail solicitation.³⁷³

B. Criticism of the Court's Reasoning

1. Misplaced reliance on prior attorney advertising decisions

This section of the analysis discusses a misplaced reliance on earlier attorney advertising decisions by the majority in *Shapero v. Kentucky Bar Association*.³⁷⁴ The *Shapero* Court, however, failed to focus properly on

365. Time, place or manner regulations do not attempt to control or regulate the actual content of the underlying speech, but only the time, place or manner in which the speech is presented. See *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977). A regulation that facially regulates only the time, place or manner may, nevertheless, unwittingly control content. *Grayned v. City of Rockford*, 408 U.S. 367 (1972). If content is actually regulated, the restriction is likely to be struck down. See *supra* note 61 for a brief discussion of time, place and manner versus content based regulations of different types of speech.

366. See *supra* notes 326-31 and accompanying text.

367. *Shapero*, 108 S. Ct. at 1920 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983)).

368. *Id.* at 1928 (O'Connor, J., dissenting). The dissent suggested some advertising would still be constitutionally protected under more rigorous standards, allowing the dissemination of legal information. *Id.* (O'Connor, J., dissenting).

369. See MODEL RULES, *supra* note 153, Rule 7.3.

370. See *supra* note 336 and accompanying text.

371. See *supra* notes 344-51 and accompanying text.

372. See *supra* notes 326-31 and accompanying text.

373. See *supra* notes 312-40 and accompanying text for a discussion of the ethical considerations, the public concerns and the underlying interests involved, which are properly served by regulating direct-target mail solicitation.

374. 108 S. Ct. 1916 (1988).

the similarities and differences between *In Re Primus*³⁷⁵ and the facts of *Shapero*. *Primus* involved an attorney who, while working with the ACLU, contacted a woman by mail about a possible lawsuit.³⁷⁶ The disciplinary charges against the attorney were dismissed because first amendment associational freedom protections were triggered.³⁷⁷ Attorney *Primus*' direct-target letter was specifically protected because it involved underlying constitutionally protected associational activities.³⁷⁸ The *Primus* Court could have ignored the associational issue and upheld the direct-target letter because it was a "truthful and nondeceptive lawyer solicitation."³⁷⁹ Instead, the *Primus* Court enunciated legitimate state concerns beyond mere truth in advertising:

The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar. The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. As we decide today in *Ohralik*, a State may also forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils.³⁸⁰

If the attorney in *Primus* had been acting for her own pecuniary interest and not furthering a protected activity, the circumstances would have been substantially similar to *Shapero*. If that had been the case, the result would not have been based upon an underlying constitutionally protected activity, but would have been subject to commercial regulation much like the companion case of *Ohralik v. Ohio Bar Association*.³⁸¹

The absolute ban on in-person advertising upheld by the *Ohralik*

375. 436 U.S. 412 (1978).

376. *Id.* at 414-16.

377. *Id.* at 439. See *supra* notes 85-99 and accompanying text.

378. *Id.* at 431. "[The letter] thus comes within the generous zone of [first amendment] protection reserved for associational freedoms." *Id.*

379. *Shapero*, 108 S. Ct. at 1924.

380. *Primus*, 436 U.S. at 438-39 (citations and footnotes omitted).

381. 436 U.S. 447 (1978). In his *Primus* dissent, Justice Rehnquist disagreed with the distinction and would have found the letter subject to the same absolute ban upheld in *Ohralik*. *Id.* at 445-46 (Rehnquist, J., dissenting). Justice Rehnquist characterized the Court's distinction turning not on form, but on the underlying conduct:

In this case and the companion case . . . the Court tells its own tale of two lawyers: One tale ends happily for the lawyer and one does not. If we were given the latitude of novelists in deciding between happy and unhappy endings for the heroes and villains of our tales, I might well join in the Court's disposition of both cases.

Id. at 440 (Rehnquist, J., dissenting).

Court is one example of a modern day commercial speech ban. The Court will not hesitate to permit limitations on commercial speech that it deems particularly worthy of regulation.³⁸² However, the *Shapero* Court's decision to reject the ban on direct-target mail solicitation cannot be traced to either *Primus* or *Ohralik*. The *Primus* ban was overruled on grounds of associational freedoms.³⁸³ In *Shapero*, a protected activity such as freedom of association was not at issue.³⁸⁴ The *Ohralik* ban was permitted because direct in-person solicitation was involved.³⁸⁵ In *Shapero*, the attorney was not soliciting cases in person, but through the mails.³⁸⁶ Therefore, the door remained open for states to regulate lawyer direct-mail solicitations to protect the public from false, misleading and overreaching information.³⁸⁷

The *Shapero* Court expressly chose to limit *Ohralik* to its facts—in-person solicitations.³⁸⁸ The *Shapero* Court could have read *Ohralik* as imposing a manner restriction, but instead interpreted *Ohralik* as concerning the attorney's specific conduct.³⁸⁹ This misses the mark. *Ohralik* was significant not because it involved a single attorney's reprehensible conduct, but because an entire category of direct-client contact was banned.³⁹⁰ A more narrowly tailored regulation could not have furthered the state's regulatory goals.³⁹¹

Furthermore, the *Ohralik* holding was never intended to be limited

382. *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344 (1986).

383. *Primus*, 436 U.S. at 431, 438-39.

384. The issue in *Shapero* was framed by the Court as presenting a question of "whether a State may . . . categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients." *Shapero*, 108 S. Ct. at 1919.

385. *Ohralik*, 436 U.S. at 466.

386. *Shapero*, 108 S. Ct. at 1919.

387. See R. ROTUNDA, *supra* note 14, § 20.31 at 150 (Court's prior decisions indicate states may regulate lawyer solicitation in order to protect public).

388. *Shapero*, 108 S. Ct. at 1922-23 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58, 464-66 & n.25 (1978)).

389. *Id.* Justice Marshall stated that "the Court's actual holding in *Ohralik* is a limited one: that the solicitation of business, under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State." *Ohralik*, 436 U.S. at 470 (Marshall, J., concurring in part and concurring in the judgment).

390. *Ohralik*, 436 U.S. at 468.

391. *Id.* at 466-67. *Ohralik* did involve an attorney visiting the client at home, but the Court went on to indicate that prophylactic regulations were not limited to direct in-person solicitation, but where [the states] demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public." *Id.* at 468. Therefore, "a solicitation in circumstances like those of this case" would warrant regulation even in the form of an absolute ban. *Id.* at 466.

to exclusively in-person solicitations.³⁹² The *Ohralik* Court suggested that other areas of attorney advertising could be subject to regulations depending on the differing degree of concerns involved.³⁹³ By failing to address *Ohralik* properly, the *Shapero* Court minimized the importance to states of regulating attorney advertising conduct.

The *Shapero* Court also improperly relied on *In Re R. M. J.*³⁹⁴ In *R. M. J.*, the Court concluded that certain mail solicitations are protected forms of advertising.³⁹⁵ However, *R. M. J.* was limited to a situation involving general mass mailings to unknown, randomly selected individuals.³⁹⁶ *Shapero*, on the other hand, involved direct-target mail where the attorney selects specific persons who are in need of specific legal services—a different manner of advertising than *R. M. J.* which warrants special scrutiny.³⁹⁷ Even the *R. M. J.* decision permitted considerable latitude for states to regulate an advertisement if it is “potentially or demonstrably misleading.”³⁹⁸

More importantly, the primary flaw in *Shapero* was the Court’s misplaced reliance upon *Zauderer v. Office of Disciplinary Counsel*.³⁹⁹ The Court devoted the majority of its opinion to drawing connections between *Shapero* and *Zauderer*. The *Zauderer* decision permitted an attorney to place newspaper advertisements offering representation for a specific legal case.⁴⁰⁰ The *Shapero* Court cites to *Zauderer* through out its opinion to distinguish and isolate all written advertisements from in-person solicitation.⁴⁰¹ One particular passage in *Zauderer* formed the basis for the *Shapero* Court’s reliance:

More significantly, appellant’s advertising—and print advertising generally—poses much less risk of overreaching or undue

392. *Shapero*, 108 S. Ct. at 1926 (O’Connor, J., dissenting). The dissent concluded that the majority’s transmutations and limitations of *Ohralik* were derived from dicta contained in *Zauderer*. *Id.*

393. The *Ohralik* Court was non-specific in identifying areas for attorney regulations. *Ohralik*, 436 U.S. at 466-67. The state regulating agency has always been held to have a strong interest in regulating attorney advertising. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977). States were still free to regulate following *Ohralik*. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-53 (1985); *In Re R. M. J.*, 455 U.S. 191, 207 (1982).

394. 444 U.S. 191 (1982).

395. *Id.* at 206.

396. *Id.*

397. *Shapero*, 108 S. Ct. at 1926 (O’Connor, J., dissenting).

398. *R. M. J.*, 455 U.S. at 202; see also *Shapero*, 108 S. Ct. at 1928 (O’Connor, J., dissenting).

399. 471 U.S. 626 (1985).

400. *Zauderer*, 471 U.S. at 647 (victims of allegedly defective Dalkon Shield advised to contact attorney for representation).

401. *Shapero*, 108 S. Ct. at 1920-24.

influence [than in-person solicitations]. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.⁴⁰²

Zauderer could have been limited to its specific facts—it is unconstitutional to ban newspaper advertising offering legal advice to similarly situated potential plaintiffs and then subsequently representing them.⁴⁰³ However, the *Shapero* Court's analysis of the opinion expanded *Zauderer* to include *all* written forms of attorney advertising.⁴⁰⁴ It concluded that since *Zauderer* could have sent a mass mailer rather than advertise in a newspaper, a direct-target solicitation is entitled to the same level of first amendment protection as any other printed advertisement.⁴⁰⁵ It is here that the logic fails.⁴⁰⁶

Zauderer did not expand first amendment protection into any new medium of advertising, as the *Shapero* opinion implies.⁴⁰⁷ Rather, *Zauderer* built upon *R. M. J.* by adding to the types of *content* that the first amendment protects in a certain media, newspaper advertising.⁴⁰⁸ The *Zauderer* result is not surprising considering that content-based restrictions are most disfavored and, predictably, subject to close scrutiny.⁴⁰⁹

The *Shapero* letter should also have been subject to a higher degree of scrutiny than the newspaper advertisements in *Zauderer* because it

402. *Zauderer*, 471 U.S. at 642.

403. *Id.* at 656.

404. *Shapero*, 108 S. Ct. at 1921-22. But see R. ROTUNDA, *supra* note 14, § 20.31 at 149; Note: *The Liberalization of Attorney Commercial Speech Rights*, 21 WAKE FOREST L. REV. 1019 (1986). These authors limited their discussion of the *Zauderer* Court decision to the disclosure requirements and the expanded ability of lawyers to advertise for specific cases or clients.

405. *Shapero*, 108 S. Ct. at 1921.

406. See *supra* notes 312-64 and accompanying text for a discussion of the problems involved with target advertising.

407. *Zauderer*, 471 U.S. at 639. The *Bates* Court, prior to *Zauderer*, approved an attorney's advertisement. *Bates*, 433 U.S. at 384. The newspaper advertisement addressed a specific legal case, and the attorney accepted employment resulting from legal advice placed in the newspaper advertisement. *Zauderer*, 471 U.S. at 639. While newspaper advertisement was previously permitted in Ohio, the practice of accepting employment resulting from truthful and non-deceptive yet unsolicited legal advice was not protected until the *Zauderer* decision. *Id.* at 626.

408. *R. M. J.*, 455 U.S. at 207.

409. See R. ROTUNDA, *supra* note 14, § 20.47 at 235-62, for a general discussion of the differences and distinctions between content and time, place or manner restrictions.

arguably implied particular knowledge of the potential client's situation.⁴¹⁰ The *Zauderer* Court did not rely upon prior attorney advertising decisions to reach its conclusion that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."⁴¹¹

The *Shapero* Court illogically jumped from the *Zauderer* newspaper advertisement to the *Shapero* direct-target letters. In the process, the Court expanded constitutional protection "around practices that have even more potential for abuse."⁴¹² The *Shapero* Court failed to undertake its own independent *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*⁴¹³ analysis, and simply utilized the above quoted dicta from *Zauderer*.⁴¹⁴ Significantly, the *Zauderer* Court did *not* suggest that future attorney advertising decisions should dispense with the critical *Central Hudson* speech analysis.⁴¹⁵ The *Zauderer* Court undertook to analyze, under *Central Hudson*, each subject advertisement and regulation before rejecting the restrictions.⁴¹⁶ The *Shapero* analysis, however, lacked the comprehensive analysis perpetuated by *Zauderer*; it merely paid it lip service.⁴¹⁷ By failing to use the proper analysis, the importance of the *Central Hudson* test in future attorney advertising cases appears diminished.

2. Failure to apply the *Central Hudson* test

In 1980, the Court established a four-part test to determine if a regulation unconstitutionally infringed upon commercial speech.⁴¹⁸ Simply

410. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

411. *Zauderer*, 471 U.S. at 647. The *Zauderer* Court based its decision on the four-part *Central Hudson* test. *Id.* at 638, 647, 651-52 & n.14 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). While the *Zauderer* opinion did discuss the other attorney advertising cases, its focus was on the application of the test. *Id.*

412. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

413. 447 U.S. 557 (1980). See *supra* notes 120-41 and accompanying text for a discussion of the four-part *Central Hudson* test.

414. *Id.* at 1921-24 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42, 646 (1985)). *Central Hudson* was briefly mentioned, yet the Court relied on *Zauderer* to reach its decision to prohibit the absolute ban. *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42, 646 (1985)).

415. *Zauderer*, 471 U.S. at 638 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)).

416. *Id.* at 639-47. See *supra* notes 188-211 and accompanying text for a discussion of how the *Central Hudson* four-part test was applied to each regulation that the attorney allegedly violated in *Zauderer*.

417. *Shapero*, 108 S. Ct. at 1920.

418. *Central Hudson*, 447 U.S. at 566.

stated, the test involves comparing commercial speech that is not misleading or untruthful and concerns a lawful activity with the state's regulation; if the regulation advances a "substantial state interest" it will be upheld unless there are less restrictive means for successfully achieving the same goal.⁴¹⁹ A primary flaw in the *Shapero* Court's analysis was its failure to apply the *Central Hudson* test properly. The *Central Hudson* test provides a tested and principled rationale to validate the regulation banning *Shapero's* direct-target letter. Applying the test against the background of the important state interests⁴²⁰ discussed above gives the states considerable latitude in future regulation of direct-target mail solicitation.⁴²¹

a. misleading, false or illegal advertising

In the majority opinion, the *Central Hudson* test is briefly mentioned, but not applied to the facts.⁴²² The *Shapero* Court correctly classified the speech as commercial, rather than political, because the attorney's own pecuniary interests were present.⁴²³ In addition, the speech involved was not *per se* misleading or untruthful nor did it involve illegal activity.⁴²⁴ Therefore, the first amendment affords it some level of

419. *Id.* The first amendment does not protect speech that is misleading, untruthful or concerns an illegal or unlawful activity. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

420. The important concerns involve the ethical professional obligation of an attorney not to subordinate the client's interests for his or her own pecuniary gain, preventing deceptive practices injurious to the public, protecting the privacy rights of the general public, and providing a forum for attorneys to advertise. *See supra* notes 312-73 and accompanying text.

421. *Shapero*, 108 S. Ct. at 1928 (O'Connor, J., dissenting).

422. *Id.* at 1921. The Court stated:

"Commercial speech that is not false or deceptive and does not concern unlawful activity . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." . . . Since state regulations of commercial speech "may extend only as far as the interest it serves," *Central Hudson* . . . state[d] rules that are . . . designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil.

Id. (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) and *In Re R. M. J.*, 455 U.S. 191, 203 (1982)). However, the *Central Hudson* test should provide the analysis for modern commercial speech cases. It synthesizes the historical evolution of the commercial speech doctrine to determine whether the governmental regulation should fail. *See R. ROTUNDA, supra* note 14, § 20.31 at 161-62; *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (*Central Hudson* test applied to validate advertising ban on Puerto Rico casinos); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (federal statute prohibiting mailing advertisements for contraceptives violates first amendment under four-part test).

423. *Shapero*, 108 S. Ct. at 1921.

424. *Id.* at 1920. This is the threshold question of the *Central Hudson* test, since misleading

protection.⁴²⁵ Accepting the advertisement at least as facially not misleading, false or illegal, the question becomes whether there is a substantial state interest in regulating attorney advertising and whether the regulation was drawn narrowly to do no more than advance that state interest.⁴²⁶

b. substantial state interest in regulating attorney advertising

The Court failed to identify a substantial state interest, and consequently failed to apply the *Central Hudson* test properly.⁴²⁷ The Court previously had noted that "the interest of the State in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"⁴²⁸ The substantial state interest breaks down into two major categories: (1) the prevention of deception, involving practices of overreaching, invasion of privacy, the exercising of undue influence deception and even fraud⁴²⁹ and (2) interests of maintaining and promoting professionalism through ethical standards.⁴³⁰ However, the demand for professionalism alone does not qualify as a substantial state interest in regulating commercial speech.⁴³¹ Therefore, ethical and professional rules and regulations are promulgated by organized bar associations to advance the legal system's demand for professionalism and, more importantly, to protect clients and the public at large.⁴³²

or false advertising or advertising of an illegal activity warrants no constitutional protection. *Central Hudson*, 477 U.S. at 566.

425. *Shapero*, 108 S. Ct. at 1928 (O'Connor, J., dissenting). But note, however, that the dissent would identify all attorney advertising as misleading because even truthful advertising fails to promote the ethical standards necessary in the legal profession. *Id.* (O'Connor, J., dissenting). In fact, however, certain types of advertising advance both the interests of attorneys and of the general public. The advertisement acts to inform the public of available standardized legal services while allowing the attorney to expand his or her practice. *Bates*, 433 U.S. at 368-70. In some instances, the advertisement may inform the public of a specific claim, and permit the attorney to specialize while exercising first amendment communication freedoms. *Zauderer*, 471 U.S. at 630-31.

426. *Central Hudson*, 447 U.S. at 566; *Zauderer*, 471 U.S. at 641.

427. *Shapero*, 108 S. Ct. at 1928-29 (O'Connor, J., dissenting).

428. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (quoting *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383 (1963)).

429. *Zauderer*, 471 U.S. at 641 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978)).

430. *See Ohralik*, 436 U.S. at 461. *But see Bates*, 433 U.S. at 371-72 (*Bates* Court did not believe professionalism argument alone sufficient to justify banning attorney advertising altogether). *See also supra* notes 68-80 and accompanying text for a discussion of the *Bates* Court decision.

431. *See supra* notes 341-43 and accompanying text.

432. *See, e.g., MODEL RULES, supra* note 153, preamble; *MODEL CODE, supra* note 154,

The interests in preventing deceptive practices and upholding the attorney's ethical obligations both serve to protect the public from unethical attorneys.⁴³³ Preventing deceptive or misleading practices is probably the most significant state interest. The position attorneys occupy in society requires that rules be designed to prevent advertising that is "misleading, overbearing or involves other features of deception or improper influence."⁴³⁴ In *R. M. J.*, the Court found that preventing deceptive practices by attorneys is a legitimate state interest and would have upheld narrowly drawn regulations.⁴³⁵ In the cases before and after *Central Hudson*, the Court found a substantial interest in the need to protect the public from attorneys who engage in "deceptive" practices.⁴³⁶ In *Shapero*, a substantial state interest was present because a lawyer was involved in an activity that might lead to potentially deceptive practices.⁴³⁷

c. the ban directly advances the state's substantial interest

The third factor in the *Central Hudson* test requires determining whether the state regulation directly advances the identified substantial state interest.⁴³⁸ A total ban on advertising would serve to protect the public from deceptive attorney practices. In *Bates*, the Court charged regulatory agencies and organizations with the responsibility of assuring that only nondeceptive advertising reaches the public.⁴³⁹ In *Ohralik*, the prophylactic ban served to advance a state interest in prohibiting overreaching attorneys from engaging in deceptive practices.⁴⁴⁰ Under circumstances similar to the facts in *Ohralik*, a total ban will further the state's interest in regulating attorney advertising.⁴⁴¹ For example, where

preamble and preliminary statement; see also CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-101 (West 1981).

433. *Ohralik*, 436 U.S. at 461. While prohibiting deceptive practices protects the public, the underlying rationale for the "ethical standards of lawyers are linked to the service and protection of clients." *Id.* The theory is that the ethical standards "further the goals of 'true professionalism.'" *Id.* (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977)).

434. *Primus*, 436 U.S. at 438.

435. *R. M. J.*, 455 U.S. at 207.

436. See *Ohralik*, 436 U.S. at 462 for a case that found "a legitimate and important state interest" in preventing fraud, undue influence, deception, and misleading practices by attorneys. *Id.*

437. See *Shapero*, 108 S. Ct. at 1919. The letter might have misled a recipient into believing that the attorney could resolve all the recipient's legal problems involving the foreclosure. *Id.*

438. *Central Hudson*, 447 U.S. at 566.

439. *Bates*, 433 U.S. at 384. "[W]e recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring the advertising by attorneys flows both freely and cleanly." *Id.*

440. *Ohralik*, 436 U.S. at 466.

441. *Id.* at 466-67. While there can be little doubt that a total ban does succeed in advanc-

the deceptive practices cannot be regulated in other effective manners, a ban may provide the only effective manner of regulating.⁴⁴² However, this part of the test concerns not whether the regulation is the only effective method of advancing a substantial state interest; rather this part focuses on whether the "regulation directly advances the governmental interest asserted."⁴⁴³

The *Shapero* analysis missed the point behind the third step of the test; the point is not to establish the narrowly tailored relationship of the regulations to the state's goal, but to show a direct link between the substantial state interest and the challenged regulation.⁴⁴⁴ Prior Court decisions easily identified this link and chose to focus on the fourth step, showing whether the regulation was not more extensive than reasonably necessary to advance the state's interest.⁴⁴⁵ The facts of *Shapero* demonstrate that a prophylactic ban on attorney direct-target mail advertising directly advances a substantial state interest: Banning direct-target mail solicitation certainly directly advances the state's interest in protecting the public from potentially deceptive, misleading, false or illegal advertising. Thus, if the *Shapero* Court had properly applied *Central Hudson*, the state regulation would have met the third requirement of the test.

d. the challenged regulation is more extensive than is necessary

The fourth and final step in the *Central Hudson* test requires a searching analysis of the state's regulation to determine if it is more extensive than necessary to advance the substantial state interest.⁴⁴⁶ The *Shapero* Court, however, never reached a logical conclusion because the

ing the substantial state interests involved, the regulations discussed in the proposal section of this Note also serve to advance the state interest in a less burdensome manner. See *supra* notes 463-502 and accompanying text.

442. *Ohralik*, 436 U.S. at 466-67.

443. *Central Hudson*, 447 U.S. at 566. Indeed, if "identification of a government interest directly advanced" meant "identification of the only permissive method of advancement," the final step of the four-part test—"whether [the regulation] is not more extensive than necessary" would not be required, and *Central Hudson* would become a three-part test.

444. *Id.* at 557. In *Central Hudson*, the Court found the link because:

[T]he State interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

Id.

445. *R. M. J.*, 455 U.S. at 207. The focus was on the means taken in advancing the regulation, and not the regulation itself; see also *Posadas*, 478 U.S. at 343 (ban on casino advertising directly advanced state's substantial interests).

446. *Central Hudson*, 447 U.S. at 566.

majority mistakenly focused on the factual similarities with *Zauderer*.⁴⁴⁷ The Court revealed its misapplication of the *Central Hudson* rationale:

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. . . . The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency.⁴⁴⁸

The issue is not whether the inspection regulations merely protect the public, but whether the regulations are sufficient to achieve the state interest described above. An absolute ban on direct-target mail solicitation may "sweep no more broadly than is necessary to advance a substantial governmental interest."⁴⁴⁹ The problem with the post-publication regulations suggested by the *Shapero* Court is that if they are ineffective the damage may have already been done.⁴⁵⁰

The Court has indicated that the presence of a failed less restrictive path may prove helpful in determining if a regulation is sufficiently narrowly drawn.⁴⁵¹ The majority in *Shapero* suggested a series of narrowly

447. *Shapero*, 108 S. Ct. at 1922-23 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985)). See *supra* notes 399-416 and accompanying text for a discussion of how *Zauderer* was misinterpreted by the *Shapero* Court.

448. *Shapero*, 108 S. Ct. at 1923 (citing *In Re R. M. J.*, 455 U.S. 191, 203, 206 (1982)). Regulatory options are discussed in the proposal sections of this Note. See *infra* notes 463-502. They are especially important following the *Shapero* Court's rejection of an absolute ban as a permissible option. Local and state bar associations should consider different available regulatory options. However, post-publication regulations do little to obviate some of the concerns that gave rise to the substantial state interests; namely, protecting the public from inherently deceptive practices and promoting ethical and principled standards of the practicing bar. See *infra* notes 463-502 and accompanying text for a proposal on permissible regulations of direct-target mail attorney solicitations.

449. *Shapero*, 108 S. Ct. at 1928 (O'Connor, J., dissenting). The dissent would have reconsidered and presumably overruled *Bates* utilizing the *Central Hudson* test. *Id.* at 1929 (O'Connor, J., dissenting). Attorney advertising, in general, does serve many of the important functions set out by the Court in *Bates*. One important area includes providing a resource to which the public may turn to locate legal services. *Bates*, 433 U.S. at 368-72.

450. See text accompanying *infra* note 451 for specific examples of how direct, unregulated solicitation of clients through the mail fails to protect the public.

451. *R. M. J.*, 455 U.S. at 206. See *supra* notes 171-74 and accompanying text for a discussion of the *R. M. J.* "sub-test," which the regulating agency may utilize to establish that a less restrictive path was initiated yet failed to advance the substantial state interest.

In those states that prior to *Shapero* had no restrictions on direct-mail solicitation, the record reveals embarrassing lawyer ethical violations. See *Leoni v. State Bar of Cal.*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *summarily dismissed*, 455 U.S. 1001 (1986). In *Leoni*, attorneys Slate and Leoni operated a large Los Angeles bankruptcy practice representing debtors where they obtained lists of defendants in pending civil small claims, municipal

tailored options, including: Requiring the lawyer to bear the burden of producing copies of letters at disciplinary proceedings; the letter stating how facts were discovered and "bear[ing] a label identifying it as an advertisement . . . or directing the recipient how to report inaccurate or misleading letters."⁴⁵² The post-publication regulations suggested by the majority may provide sufficient protection from deceptive, misleading or overreaching attorneys but do little to protect the privacy interests of individuals or further the ethical obligations of the legal profession. However, other effective post-publication regulations can prevent deceptive practices, protect the public's privacy interests and uphold ethical profession-wide standards.⁴⁵³ Thus, the privacy interests of the public⁴⁵⁴ are best protected through an absolute ban, but other means of regulating

and superior court cases. Over the course of twenty months, the attorneys sent out over 250,000 letters; these letters outlined bankruptcy as an available option to these defendants for debt relief, perhaps even for relief from the pending actions. *Id.* at 615-16, 704 P.2d at 186-87, 217 Cal. Rptr. at 426-27. Many recipients were unaware of the status of the lawsuits, filed simply to protect against the statute of limitation and in some situations informational letters mailed to individual's homes and office acted to advise employers and families of legal problems defendants were attempting to resolve quietly; *Id.* at 618-21, 704 P.2d at 188-90, 217 Cal. Rptr. 428-30; *In Re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985). In *Von Wiegen*, an attorney directed his secretary to send letters to victims and families of victims of the Kansas City Hyatt hotel disaster; the letters indicated that the secretary was the chair of a special committee established to assist the accident victims. *Id.* at 178-79, 470 N.E.2d at 846-47, 481 N.Y.S.2d at 48-49. The committee had supposedly appointed attorney Von Wiegen as special counsel. The letter went on to state that Von Wiegen was also more than happy to represent victims in their own lawsuits. *Id.*; see also *Adams v. Attorney Registration & Disciplinary Comm'n*, 801 F.2d 968 (7th Cir. 1986) (group of bankruptcy attorneys utilized direct-target mail solicitation, sued state committee for injunctive relief allowing them to continue the practice of mail advertising solicitation); *Greene v. Grievance Comm.*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981) (attorneys disciplined for sending solicitation letters to real estate brokers).

For cases following the *Shapero* decision see *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3d Cir. 1988) (attorney utilized drawings and characters, classified by state as undignified, in direct-target mail solicitation); *Superior Beverage Co. v. Owens-Illinois Inc.*, No. 83 Civ. 512 (N.D. Ill. Aug. 16, 1988) (1988 WESTLAW 87038) (attorneys involved in class action litigation representing plaintiffs sent letters to other potential class action plaintiffs); *Paris v. Lake Carroll Holding Inc.*, No. 87 Civ. 8502 (N.D. Ill. July 14, 1988) (1988 WESTLAW 74672) (attorneys sent letters to lot owners who may have had claims, warning them to investigate land and potential health claims; and lawyer willing to represent for fee).

452. *Shapero*, 108 S. Ct. at 1924. The *Shapero* Court did not indicate whether the proposed regulations would advance the substantial state interest. *Id.*

453. See *supra* text accompanying note 451. New York and California are two states where the advertising ban had been lifted prior to *Shapero*. In those states, little or no post-regulations and restrictions have not succeeded in controlling or preventing abuses. *Id.* In California and New York, the state high courts effectively lifted any advertising ban on direct-mail solicitation in their respective opinions. *Leoni*, 39 Cal. 3d at 624, 704 P.2d at 192, 217 Cal. Rptr. at 432; *Von Wiegen*, 63 N.Y.2d at 170, 470 N.E.2d at 841, 481 N.Y.S.2d at 43.

454. See *supra* notes 344-51 and accompanying text for a discussion of privacy concerns and the rationale for protecting the privacy interest.

direct-target mail advertising and protecting the privacy interests are available. Direct-target mail letters are certainly subject to deceptive practices because they are not subject to any public scrutiny and inherently exercise substantial influence over laypersons.⁴⁵⁵ However, they may be regulated in a manner less restrictive than an absolute ban.

Four underlying principles emerge as representative of the varying interests involved in the regulation of attorney advertising and solicitation: (1) the ethical obligations lawyers owe to the public and their profession; (2) the protection of the public from overreaching and deceptive practices; (3) potential client's right of privacy; and (4) the commercial free-speech rights of attorneys to disseminate information and the public to receive this information.⁴⁵⁶ The *Central Hudson* four-part test should be applied against the backdrop of these principles when analyzing direct-mail solicitation of clients.⁴⁵⁷ The state's substantial interest in regulating potentially deceptive and overreaching practices can be effectively achieved through an absolute ban on this type of solicitation. However, an absolute ban is more restrictive than necessary to achieve the state goal. The regulation banning direct-mail advertising in *Shapero* fails under the "least restrictive" prong of the *Central Hudson* test because the less restrictive regulations, such as those suggested by the Court,⁴⁵⁸ could have been implemented.

In sum, the *Shapero* Court did not properly apply the *Central Hudson* test, yet reached the correct result. The Court ignored the underlying principles discussed above in its analysis.⁴⁵⁹ The Court undermined the continued validity of the *Central Hudson* test in attorney advertising cases by paying the test short shrift.⁴⁶⁰ Regulating agencies will now need to establish rules and regulations furthering important state interests specifically in the area of direct-target mail attorney advertising.⁴⁶¹ Yet, the *Central Hudson* test is still valid authority since it has never

455. See *supra* notes 344-64 and accompanying text for a discussion of overreaching deceptive practices and the rationale for regulating certain types of attorney advertising/solicitations.

456. See *supra* notes 312-73 and accompanying text.

457. See *supra* note 417 to *infra* note 461 and accompanying text for a general discussion of the *Central Hudson* test as applied to *Shapero*.

458. See *supra* notes 263-64 and accompanying text.

459. See *supra* notes 312-73 and accompanying text for a discussion of the underlying principles.

460. *Shapero*, 108 S. Ct. at 1921.

461. See *infra* notes 463-502 and accompanying text for a proposal on how states might regulate after *Shapero*. These regulations achieve some control over direct-mail solicitation of potential clients by regulating the communication in a less restrictive manner and by sanctioning unprofessional conduct.

been overruled and is still applied in commercial speech contexts.⁴⁶² The application of the four-part test remains important to validate state regulations. The Court should not stray from the clear guidance *Central Hudson* provides.

V. PROPOSAL

In *Shapero v. Kentucky Bar Association*,⁴⁶³ the Court's decision prohibited only absolute bans of direct-mail solicitation.⁴⁶⁴ The Court expressly left the door open for bar associations and states to regulate attorney direct-mail solicitation short of an absolute ban.⁴⁶⁵ This proposal suggests four nonexclusive direct-target mail regulations. First, state or local bar associations should establish their own pre-approval system for reviewing proposed direct-mail letters. Second, mandatory disclosure requirements should be promulgated requiring: identification of the correspondence as an advertisement; disclosure of the state attorney disciplinary agency; and, an explanation of how the recipient's name and legal problem were discovered. Third, to protect privacy concerns, letters should only be sent to verifiable addresses through certified return receipt mail. Finally, in personal injury/wrongful death practice, potential plaintiffs may be solicited only following a brief holding period.

Reasonable time, place and manner regulations are firmly rooted in noncontent-based controls available for all commercial speech.⁴⁶⁶ It follows, that even after *Shapero*, the first amendment permits regulating the

462. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (*Central Hudson* test applied to validate ban on casino advertising in Puerto Rico); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (four-part test invalidated law prohibiting mailing of advertisements for contraceptives).

463. 108 S. Ct. 1916 (1988).

464. *Id.* at 1923.

465. *Id.* at 1923-24. The Court stated:

To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Id. at 1924 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)).

466. See generally R. ROTUNDA, *supra* note 14, § 20.47; *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (anti-noise ordinance prohibiting loud disturbances near school not violative of first amendment as regulation content neutral and designed to further significant governmental interest—preventing disruption of class work); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card not protected speech, but valid manner restriction). But see *Linmark Assocs. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (restriction on "for sale" sign invalidated because concerned content, not time, place or manner). Traditionally, commercial speech is afforded less constitutional protection than other forms of speech. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980).

manner in which direct-target mail advertising is conducted. This proposal suggests to state and local jurisdictions permissible regulations for direct-target mail advertising which will prevent deception, privacy invasions, protect professional ethics and withstand constitutional scrutiny.⁴⁶⁷

A. *Preapproval of Direct-target Mail Solicitation*

One approach would require the soliciting attorney to obtain prior approval before sending solicitation letters.⁴⁶⁸ This regulation could operate in a manner similar to the screening mechanism established by the Securities and Exchange Commission for proxy solicitation.⁴⁶⁹ Under a similar type of screening mechanism, an attorney would be required to file a copy of his or her solicitation letter with a committee of the bar. The committee would then review the letter, make any necessary changes, and return the letter to the attorney for re-drafting. Preapproval has been formally criticized for the difficulty in implementing an efficient system.⁴⁷⁰ Several states, in fact, have had difficulties implementing preapproval systems. For example, one bar association required preapproval for each individually personalized letter sent in a mass mailing.⁴⁷¹ The costs of such efforts were high and implementation quite difficult. Nevertheless, such a system is workable.

First, the fees paid for the pre-approval service could fund the administration process. The costs, however, could be covered by requiring that every time an attorney utilizes a bar association's preapproval services, a reasonable administrative fee may be charged. Most letters will easily comply with the state's preapproval requirements because the standards could be published by the regulating agency for reference. Those that do not meet minimum standards could be returned to the soliciting attorney for redrafting. Larger state bar associations could delegate duties to smaller regional bar associations.⁴⁷²

The administrative burden on attorneys wishing to solicit by mail

467. See *supra* notes 341-64 for a discussion of unethical and deceptive practices.

468. See generally Perschbacher & Hamilton, *Reading Beyond the Labels: Regulation of Lawyers' Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255, 274-78 (1987).

469. 17 C.F.R. § 240.14a-6 (1988).

470. Coyle, *Was Direct Mail the Last Taboo?*, Nat'l L.J., June 27, 1988, at 3, col. 1.

471. *Id.* Florida Bar adopted a preapproval program yet immediately encountered problems when one large law firm undertook a mass direct-mailing campaign. *Id.*

472. In some states it is not uncommon for local or regional bar associations initially to bear the responsibility of discipline and attorney regulations. See e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 356 (1977). The disciplinary charges were originally heard by a local committee appointed by the state bar association. *Id.*

would not be great. A single form letter could be preapproved. Other attorneys soliciting on a narrower basis may choose a single form letter that could be used for a number of purposes. Still others could select personalized letters for each potential client, and comply with the filing requirements every time they solicit. Finally, the bar association could provide a form letter that has been preapproved and intended for uniform use.

In the end, a preapproval procedure would not only protect the public, but would shield the attorney from unwarranted and burdensome disciplinary complaints stemming out of the direct-mail solicitation.

B. Mandatory Disclosure Requirements

A second regulatory approach would focus on disclosure. Disclosure requirements, "reasonably related to the [s]tate's interest in preventing deception of consumers" are acceptable under the first amendment.⁴⁷³ The suggested disclosure requirements for direct-target mail solicitations are: (1) identifying the direct-mail solicitation as an advertisement; (2) naming the appropriate agency for filing complaints; and (3) explaining how the recipient's name was obtained by the lawyer.

Under the first requirement, each letter sent to a targeted individual should be conspicuously identified as an advertisement carrying no legal obligation. This would limit, but not remove, the overpowering effect an attorney's letter may have on its recipient.⁴⁷⁴ Under the second requirement, the letter should explain which state or local agency regulates attorneys, and how a recipient can complain to the appropriate agency concerns arising out of the receipt of the letter.⁴⁷⁵ If the potential client is instructed on how to complain, they could always register their displeasure with the regulating agency, or even directly with the soliciting attorney. The letter also would clearly identify the role of the attorney who sends the solicitation.⁴⁷⁶

The direct-mail letter could disclose how the attorney learned of the

473. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

474. See *supra* notes 357-64 and accompanying text for a discussion of how overpowering an attorney's letter can be.

475. For example, in California letters received from a collections agency must state that the collector is regulated by the Department of Consumer Affairs and provide an address and phone number for reporting complaints or inquiries. CAL. CIV. CODE § 1788.12 (West 1985). Also, when dealing with consumers of an electronic commerce service, such as a television shopping service, the service must disclose the appropriate regulatory agency with which to lodge complaints against the merchant. CAL. CIV. CODE § 1789.3 (West Supp. 1989).

476. See *In Re Von Wigen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 163 (1984), *cert. denied*, 472 U.S. 1007 (1985), where the solicitation was claimed to have come from a disinterested committee, but in reality originated from the soliciting attorney.

recipient's name and specific legal problem.⁴⁷⁷ For example, the correspondence could indicate that the legal problem is a matter of public record. Additionally, the correspondence would require the soliciting attorney to indicate that he or she has no special knowledge of the potential client's specific legal problem, but that the attorney has a knowledge of that area of law. This requirement would assure future privacy by providing the recipient an opportunity in some circumstances to request his or her name not be released to the public.⁴⁷⁸ There may even be some circumstances where contacting a potential client through permissive means is such an invasion of privacy that a temporary absolute ban is warranted.⁴⁷⁹ In these situations intrusions on privacy interests of a targeted recipient must be weighed against the attorney's first amendment interests.⁴⁸⁰

Of course, the potential client's name and legal problem may be discovered only through permissible means. Thus, another goal of these proposed regulations is to prevent an overreaching soliciting attorney from employing illegal methods of locating potential clients.⁴⁸¹ The letter should state precisely how the information was ascertained, preventing the attorney from successfully employing improper methods. These requirements also ensure that if an attorney has received a name through illegal means, a paper trail will remain for use by an investigating disciplinary agency.

477. *Shapero*, 108 S. Ct. at 1924. The *Shapero* Court recommended that the reviewing agency require that "the lawyer . . . explain briefly how she discovered the fact." *Id.*

478. Some records, even if they are government property, may not be released to the general public, even under state and federal freedom of information acts. *See e.g.*, 5 U.S.C. § 552 (1986) (Freedom of Information Act). *See also supra* notes 344-51 and accompanying text for a discussion of the privacy issues involved when an attorney or his representative locates someone with a specific potentially embarrassing legal problem.

479. In certain situations the gravamen of the situation could produce emotional stress, impairing the ability of the recipient to make logical or well-informed decisions. In these narrow circumstances, a limited and temporary ban may be approved.

480. *Breard v. Alexandria*, 341 U.S. 622, 641-42 (1951) *overruled on other grounds*, *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

481. Attorneys may not utilize illegal practices such as capping to obtain clients. *See supra* text accompanying note 350. Other illegal means would include unlawfully obtaining records of potential clients by breaching public secrecy acts. *See* 5 U.S.C. § 552(b)(7) (Freedom of Information Act prohibits the public disclosure of records involving public and private secrets). Breaching privacy privileges between a patient and a physician could result in liability. *See* CAL. EVID. CODE § 994 (West 1966 & West Supp. 1989) (Evidence Code of California prohibits disclosure of privileged communications between a patient and his physician).

C. *Guaranteeing Only the Targeted Recipient Receive the Direct-Mail Solicitation*

It is important that direct-mail correspondence reach only the targeted recipient. There is a possibility of embarrassment to the recipient if an attorney's direct-mail solicitation falls into the wrong hands.⁴⁸² Legal matters may involve private issues such as an arrest,⁴⁸³ or monetary difficulties, including filing for bankruptcy.⁴⁸⁴ If a communication from an attorney offering representation were received and read by someone other than the intended recipient, the potential client's privacy has been invaded, and the individual might feel humiliation and embarrassment.

To reduce these problematic issues, bar associations or other agencies could require that the soliciting attorney send the correspondence only to a verifiable home address. Verification can be as simple as checking an accident or arrest report, or it may be more involved. To make absolutely certain that only the potential client receives the correspondence, a regulation could require that the correspondence be sent by certified mail with return receipt requested, to be signed and completed only by the addressee. These and other regulations would ensure the communication from an attorney is only received by the potential client, and could reduce the possibility that others would receive the correspondence.

The goal of regulations such as these are to reduce potential privacy invasions. If only the individual with the particular legal problem receives the attorney's solicitation, the potential for substantive privacy invasions is reduced.⁴⁸⁵ Therefore, the intent of the regulating agency would be to make a targeted direct-mail correspondence just that—targeted and direct. It is difficult to prevent all potential privacy invasions; these proposed regulations, however, would succeed in constitutionally protecting many of these interests.

482. See, e.g., *Leoni v. State Bar of Cal.*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *summarily dismissed*, 455 U.S. 1001 (1986) (direct-target mail solicitation offering advice concerning filing of bankruptcy intercepted by complainant's employer).

483. See Cohen, *Direct Mail Legal Pitches Get Big Boost*, Wall St. J., July 5, 1988, § 2, at 21, cols. 3-6 (attorney looked through police reports of arrests to locate potential clients for sending direct-mail solicitation).

484. See *supra* text accompanying note 482.

485. *Leoni*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *summarily dismissed*, 455 U.S. 1001 (1986). In *Leoni*, attorneys sent 250,000 direct-mail solicitation letters to defendants in pending civil suits. *Id.* at 615-16, 704 P.2d at 186-87, 217 Cal. Rptr. at 426-27. Some recipients' letters were intercepted and read by others. *Id.* at 620, 704 P.2d at 189, 217 Cal. Rptr. at 429. The state court struck down the regulation. *Id.* at 624, 704 P.2d at 192, 217 Cal. Rptr. at 432.

D. Regulating Personal Injury Client Solicitation

Personal injury tort practice is a specific area in need of regulation.⁴⁸⁶ This specialty has been identified with particular concern from the earliest case protecting attorney advertising in *Bates v. State Bar of Arizona*.⁴⁸⁷ Following an accident or injury, the victims or their families may "find their mailbox stuffed with letters from lawyers."⁴⁸⁸ In one case, for example, following a mass disaster in a state that permitted the practice of direct-mail solicitation, the victims' families were inundated with letters following the incident.⁴⁸⁹ The proliferation of a practice so intrusive on personal privacy at a time when the recipient is most susceptible to deception has been the subject of Supreme Court scrutiny and warrants special regulation.⁴⁹⁰

One suggested regulation in this area involved a "cooling off" period during which the potential client could rescind a retainer agreement that evolved from direct-mail solicitation.⁴⁹¹ This approach, however, is problematic because the attorney may be entitled to the fair value of services rendered, and the attorney may be reluctant to commence working for the client until the period has passed.⁴⁹²

A more even-handed regulation could be to entirely prohibit any attorney from utilizing direct-mail soliciting for a brief period following the injury. This would allow the victim or the family to recover, gain composure and face the situation's legal complexity. In addition, the regulation would help ensure that the attorney most qualified and competent is retained, not a lawyer who successfully beats the competition in issuing solicitation letters. This type of regulation—a short-term ban—would be upheld because it is not absolute, but rather an evenly administered time and manner restriction.⁴⁹³

The four general areas of proposed regulation—(1) preapproval of

486. Coyle, *supra* note 470, at 3, col. 1.

487. 433 U.S. 350 (1977).

488. Lawry, *Litigation Ethics, Solicitation by Mail*, 11 LITIGATION, No. 3, 51 (1985).

489. *In Re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985).

490. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449-54 (1978).

491. *See Perschbacher & Hamilton, supra* note 468, at 273.

492. *Id.* The practice of rescinding an attorney-client retainer agreement is problematic because the attorney may have worked on the case and is entitled to the value of the time spent. Additionally, the attorney may be reluctant to work diligently on the matter until after the "cooling off" period has passed. *Id.*

493. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (anti-noise ordinance prohibited picketing near school in session permissible time, place and manner regulation); *see also* R. ROTUNDA, *supra* note 14, § 20.47 at 235-61.

all direct-target mail solicitation, (2) disclosure requirements,⁴⁹⁴ (3) direction of the correspondence only to the addressee-potential client, and (4) special requirements imposed on personal injury/wrongful death cases—all would survive the four-part *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* test.⁴⁹⁵ The first three prongs⁴⁹⁶ are easily met.⁴⁹⁷ There exists a substantial state interest in regulating commercial speech and protecting the public from potentially deceptive practices.⁴⁹⁸ The regulations directly advance the substantial state interest in protecting the public from overreaching, misleading and potentially deceptive attorney practices.⁴⁹⁹

More importantly, the proposed regulations also neatly fit into the final critical step of the *Central Hudson* four-part test because they are no more extensive than necessary to accomplish the states' goals.⁵⁰⁰ They permit truthful, non-misleading targeted-mail solicitation; thus, they are carefully drawn so as not to infringe upon the advertising attorney's first amendment privilege. Moreover, these regulations are designed to achieve many of the underlying goals articulated by proponents of the absolute ban in *Shapero*, without violating the first amendment.⁵⁰¹

The proposed regulations and disclosure requirements are not meant to be exclusive. Some jurisdictions may conclude that a particular practice area warrants more extensive regulation. Other states may even temporarily preclude direct-mail solicitation in special circumstances where the state interest is so great that only a temporary absolute ban is effective in advancing that interest.⁵⁰² However, these proposed regulations do provide protections to the public while avoiding an infringement of an attorney's first amendment rights.

494. The four subsets of disclosure requirements are: (1) identification of the correspondence as an advertisement; (2) identification of the regulating agency and how to report an attorney; (3) identification of the attorney who has sent the targeted-mail solicitation; and (4) identification of how the attorney learned of the potential or actual legal problem. See *supra* notes 473-81 and accompanying text.

495. 447 U.S. 557, 566 (1980).

496. See *supra* notes 422-45 and accompanying text.

497. See *supra* note 424 and accompanying text.

498. See *supra* note 437 and accompanying text.

499. See *supra* note 443 and accompanying text.

500. *Central Hudson*, 447 U.S. at 566.

501. *Shapero*, 108 S. Ct. at 1926 (O'Connor, J., dissenting).

502. A temporary, yet absolute ban can be thought of as a time, place or manner restriction, and under appropriate circumstances, be upheld as not violating the Constitution. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); see also *ROTUNDA*, *supra* note 14, § 20.47 at 235-61.

VI. CONCLUSION

The history of attorney advertising is marked with ethical and constitutional conflicts.⁵⁰³ Ethically, the attorney is obliged to place his or her client's interests ahead of all other concerns.⁵⁰⁴ Advertising and soliciting present unethical attorneys an opportunity to engage in deceptive practices for pecuniary gain and to invade potential clients' privacy.⁵⁰⁵ Thus, the organized bar and regulating agencies must be permitted to promulgate reasonable regulations to eliminate deceptive practices.

Constitutionally, attorney advertising is a form of commercial speech. As such, it receives limited protection by the first amendment.⁵⁰⁶ The Supreme Court has crafted a well established, four-part test to determine whether the first amendment protects a particular commercial expression.⁵⁰⁷ In its most recent pronouncement on the subject of attorney advertising, the 1988 case of *Shapiro v. Kentucky Bar Association*,⁵⁰⁸ the Supreme Court of the United States struck down Kentucky's absolute ban on direct-target mail solicitation under the first amendment.⁵⁰⁹ In overturning the rule, however, the Court failed to apply its well established four-part commercial speech test.⁵¹⁰

By failing to apply the test, the Court has put into question whether many states' regulations addressing direct-target mail solicitation remain viable. The Court has therefore undermined the states' efforts to ensure ethical attorney conduct. Since the Court did not overrule the four-part test, states should continue to rely on it for guidance in regulating direct-target mail solicitation.

Under the guidance of the four-part test, and yet consistent with *Shapiro*, states may implement time, place and manner restrictions such as: (1) requiring preapproval of all direct-target mail solicitation; (2) imposing disclosure requirements; (3) requiring that the correspondence is directed only to the potential client; and (4) in the personal injury field, imposing a special "holding period" before solicitation is permitted.

503. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (attorney advertising could not be categorically banned under the first amendment).

504. MODEL RULES, *supra* note 153, Rule 1.7.

505. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461 (1978).

506. *Bates*, 433 U.S. at 383-84.

507. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

508. 108 S. Ct. 1916 (1988).

509. *Id.* at 1921-24.

510. See *supra* notes 418-55 for a discussion of how the *Central Hudson* four-part test was not applied and how it should have been applied in *Shapiro*.

Although these restrictions are consistent with *Shapero*, the Court should take the first opportunity it possibly can to clear the air regarding the viability of rules regarding direct-target mail solicitation.

*Brian S. Kabateck**

* This Note is dedicated to Roxanne Hampton, my wife, companion and confidant and to our parents and friends for their support during my law school ordeal.